

NATIONAL GREENHOUSE AND ENERGY REPORTING ACT 2007

NATIONAL GREENHOUSE AND ENERGY REPORTING
(SAFEGUARD MECHANISM) RULE 2015

EXPLANATORY STATEMENT

(Issued by the authority of the Minister for the Environment)

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General outline and statements

Introduction

The Emissions Reduction Fund is central to the Government's Direct Action Plan to cut greenhouse gas emissions to five per cent below 2000 levels by 2020 and to 26 to 28 per cent below 2005 levels by 2030. It comprises an element to credit emissions reductions, a fund to purchase emissions reductions and a safeguard mechanism to ensure that these reductions are not displaced by a significant rise in emissions above business-as-usual levels elsewhere in the economy.

The legislation for the Emissions Reduction Fund was passed in November 2014. This established the legislative framework for the safeguard mechanism in the *National Greenhouse and Energy Reporting Act 2007* (the Act). The legislation included that the safeguard mechanism will apply to designated large facilities. The entity with operational control of a designated large facility will be responsible for meeting safeguard requirements, including that the facility must keep net emissions at or below baseline emissions levels.

Legislative rules and regulations will give effect to policy details, including the threshold for what is a designated large facility and methods for setting the baseline emissions level for a designated large facility. The safeguard mechanism will commence on 1 July 2016.

Legislative rules under section 22XS of the Act to support the operation of the safeguard mechanism have been made. The purpose of this Explanatory Statement is to explain the provisions included in these rules.

Safeguard mechanism legislative framework

The Act establishes a single national framework for reporting and disseminating company information about greenhouse gas emissions, energy production, energy consumption and other information.

On 1 July 2016, amendments made to the Act through the *Carbon Farming Initiative Amendment Act 2014* (Amendment Act) will commence. These amendments provide a legislative framework for the safeguard mechanism, the final element of the Australian Government's Emissions Reduction Fund.

Section 22XS of the Act empowers the Minister to make legislative rules to implement the safeguard mechanism. The legislative rules will specify the administrative detail of how the safeguard provisions will be implemented, including which kind of facilities will be covered, how emissions baselines will be set, and administrative processes for demonstrating compliance with safeguard obligations.

The purpose of this Explanatory Statement is to explain the provisions included in the *National Greenhouse and Energy Reporting (Safeguard Mechanism) Rule 2015* (the safeguard rule).

Amendments will also be made to a number of related legislative instruments to give effect to the safeguard mechanism, including: the *National Greenhouse and Energy Reporting*

Regulations 2008, the *National Greenhouse and Energy Reporting (Audit) Determination 2009* and the *National Greenhouse and Energy (Measurement) Determination 2008*. These amendments were released for consultation separately. An overview of the legislative framework for the safeguard mechanism is provided in Table 1.

Table 1—Summary of the safeguard mechanism legislative framework

Primary legislation	Schedule 2 of the <i>Carbon Farming Initiative Amendment Act 2014</i> establishes the safeguard mechanism by amending the <i>National Greenhouse and Energy Reporting Act 2007</i> . These amendments will commence on 1 July 2016.
Implementing agency	The <i>Clean Energy Regulator Act 2011</i> sets out the powers and functions of the Clean Energy Regulator (the Regulator). The Regulator will administer the safeguard mechanism.
Safeguard rule	<p>The <i>National Greenhouse and Energy Reporting (Safeguard Mechanism) Rule 2015</i> will establish the operational elements of the safeguard mechanism, including:</p> <ul style="list-style-type: none"> • specifying the designated large facility threshold • establishing how baselines will be set • setting out administrative processes for demonstrating compliance with safeguard obligations.
Consequential amendments	<p>The <i>National Greenhouse and Energy Reporting Amendment (2015 Measures No. 2) Regulation 2015</i> will set out changes to the <i>National Greenhouse and Energy Reporting Regulations 2008</i>, including:</p> <ul style="list-style-type: none"> • providing for transport facilities to be defined on a national basis on an opt-in basis • including safeguard audits in the general audit framework • setting the maximum civil penalty amount in the event of non-compliance. <p>Amendments to the <i>National Greenhouse and Energy Reporting (Measurement) Determination 2008</i> will ensure that methods are available to measure legacy and non-legacy waste separately, in accordance with the policy to limit coverage to waste that is deposited at a landfill after 1 July 2016.</p> <p>Amendments to the <i>National Greenhouse and Energy Reporting (Audit) Determination 2009</i> will introduce the concept of a ‘safeguard audit’ and ensure that the determination is relevant to the safeguard mechanism.</p>

Public consultation

The Government has consulted widely on the safeguard mechanism's design. Terms of reference were consulted on in October 2013, followed by a Green Paper in December 2013 leading to release of a White Paper in April 2014. The Government announced a number of important policy decisions on the safeguard mechanism in the White Paper. During passage of the Carbon Farming Initiative Amendment Bill through Parliament, amendments were made to the *National Greenhouse and Energy Reporting Act 2007* (Act). These established a legislative framework for the safeguard mechanism and enabled final design elements to be implemented through legislative rules. A Regulation Impact Statement was prepared that explores options for the remaining design decisions pertaining to the safeguard mechanism, that is those design elements not decided in either the Act or the White Paper. It also includes estimates of the regulatory burden arising from the introduction of the safeguard mechanism to inform the Government's final decision on its design.

Public consultation was undertaken in September 2015 on the exposure draft safeguard rule, informed by a draft Explanatory Statement. A number of stakeholder briefings and teleconferences were held. Forty-eight submissions on the exposure draft safeguard rule were received during the consultation period.

Regulatory impact

The Department of the Environment certified the Emissions Reduction Fund White Paper as a Regulation Impact Statement for initial decisions on the Emissions Reduction Fund. These decisions included the Emissions Reduction Fund crediting and purchasing arrangements, Carbon Farming Initiative arrangements incorporated into the Emissions Reduction Fund, and coverage of the Emissions Reduction Fund safeguard mechanism in accordance with the Australian Government Guide to Regulation. This was followed with a dedicated Regulation Impact Statement for the safeguard mechanism which was finalised after thorough consultation with a wide range of stakeholders. The Regulation Impact Statement focused on the policy commitment made by the Australian Government, and the manner in which it should be implemented, exploring options and setting recommendations for design decisions not already settled in the Act or the White Paper. The safeguard mechanism will send a signal to businesses to avoid significant increases in emissions beyond business-as-usual levels. It will do so in a light touch way that supports economic growth and allows businesses to continue normal operations.

Safeguard rule details

The safeguard rule is a legislative instrument within the meaning of the *Legislative Instruments Act 2003*. It will commence on 1 July 2016.

Statement of compatibility with human rights

A Statement of Compatibility with Human Rights, prepared in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*, is at page 119 of the Explanatory Statement.

Policy context

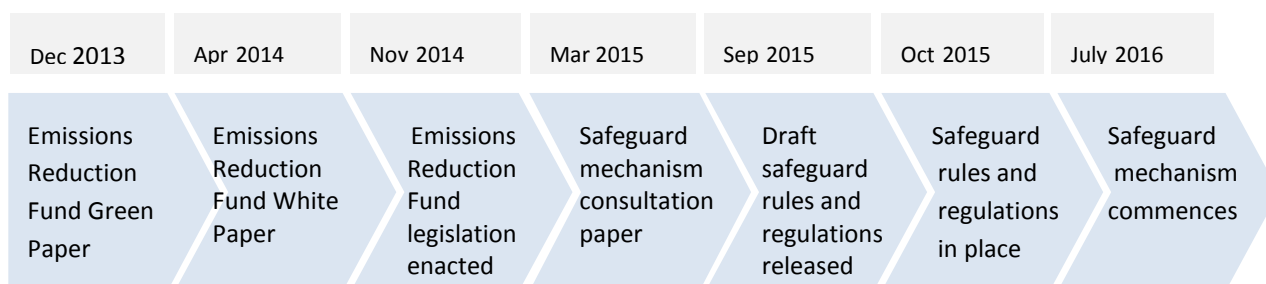
The Emissions Reduction Fund

The Emissions Reduction Fund is central to the Government's Direct Action Plan to cut emissions to five per cent below 2000 levels by 2020 and to 26 to 28 per cent below 2005 levels by 2030. It comprises an element to credit emissions reductions, a fund to purchase emissions reductions, and a safeguard mechanism to ensure that these reductions are not displaced by a significant rise in emissions above business-as-usual levels elsewhere in the economy.

The **crediting and purchasing elements** will lower national emissions, while funding businesses to undertake projects that will improve their productivity, for example through more efficient industrial processes, improved household and commercial energy efficiency and improved soil productivity.

The **safeguard mechanism** will safeguard the value of funds spent under the Emissions Reduction Fund by requiring large businesses to keep emissions below baseline levels. This section outlines its final design, which has been determined following extensive consultation with businesses and the community. The Emissions Reduction Fund Green Paper was released in December 2013 for public comment, followed by a White Paper in April 2014 outlining key design features. A consultation paper canvassing options for the safeguard mechanism was released in March 2015. The views expressed in over 85 submissions have informed the final design. The safeguard mechanism will commence on 1 July 2016. The timeline for the design and implementation of the safeguard mechanism is illustrated in Figure 1.

Figure 1—Design and implementation timeline for the safeguard mechanism



Key elements of final safeguard design

- **Duty to avoid excess emissions:** designated large facilities must keep net emissions at or below baseline emissions levels.
 - **Start date:** the safeguard mechanism will commence on 1 July 2016.
 - **Coverage:** the safeguard mechanism will apply to facilities with direct emissions of more than 100,000 tonnes of carbon dioxide equivalence (t CO₂-e)
- It will apply broadly to a variety of business entities, including corporations, partnerships, trusts, and local councils.
- The entity with operational control of a designated large facility will be responsible for meeting safeguard requirements.
- **Baselines for existing facilities:** baselines for existing facilities will reflect the highest level of reported emissions over the historical period from 2009-10 to 2013-14, and will be adjusted to accommodate economic growth, natural resource variability and other circumstances where historical baselines are not representative of future emissions performance.
- To support economic growth, baselines will be permanently increased if a facility undertakes a significant expansion, defined as an increase in maximum productive capacity of more than 20 per cent.
- To accommodate incremental growth, baselines will be temporarily increased in any year where expanding production is accompanied by an emissions intensity improvement.
- Baselines can be adjusted to accommodate emissions variability associated with the extraction of a natural resource or reserve.
- To accommodate other circumstances where historical emissions are not representative of future business-as-usual emissions performance, baselines can be adjusted if facilities expect to exceed their baseline in the safeguard mechanism's first year.
- **Baselines for new investments:** baselines for new investments will encourage facilities to achieve and maintain best practice.
- Benchmark emissions intensities will be used to determine baselines for new investments whose covered emissions first exceed 100,000 t CO₂-e after 1 July 2020.
- In the period to 2020, baselines for new investments will reflect an audited emissions forecast provided by the facility operator, with an adjustment of the estimate after the forecast period, based on actual performance.

Continued...

- **Emissions management:** flexible compliance arrangements will give designated large entities access to options for meeting safeguard obligations.
- A ‘net emissions’ approach will allow businesses to use Australian Carbon Credit Units (ACCUs) to offset emissions.
- Multi-year monitoring will allow a facility to exceed its baseline in one year, so long as average emissions over two or three years are below baseline.
- An exemption will be available for facilities whose emissions are the direct result of exceptional circumstances, such as a natural disaster or criminal activity by another party.
- **Electricity:** A sectoral-baseline will apply to the electricity sector, with individual baselines to apply in the event that the sectoral-baseline is exceeded.
- Sectoral-baselines will be set at the high point of sectoral emissions over the period 2009-10 to 2013-14.
- Individual baselines will also be set at each facility’s highest annual covered emissions between 2009-10 and 2013-14. Generators will have access to the same emissions management options as facilities in other sectors, as well as similar baseline adjustments to accommodate economic growth.
- **Administration:** the safeguard mechanism will be administered by the Clean Energy Regulator (the Regulator).
- The operation of the safeguard mechanism will be reviewed in 2017 to ensure its ongoing effectiveness.

Coverage

The safeguard mechanism will apply economy-wide to facilities with direct emissions of more than 100,000 t CO₂-e a year.

The 100,000 t CO₂-e threshold will cover around 140 large businesses—representing around half of Australia’s emissions—from a range of sectors including power generation, mining (coal and metal ores), oil and gas extraction, gas supply, manufacturing (including metals, cement and lime), transport (air, sea, rail and road), heavy and civil engineering construction, and waste.¹ Emissions from the electricity sector represent around 57 per cent of covered emissions.

Direct (or scope 1) emissions are defined in the Act. They include fuel combustion, emissions from physical and chemical processes and fugitive emissions. Electricity generators will be responsible for the emissions from electricity production.

The safeguard mechanism will apply broadly to cover a variety of legal structures, including corporations, trusts, and local councils. A broad approach promotes competitive neutrality by covering different legal entities operating in the same market.

The business with operational control of a designated large facility, termed the responsible emitter, will be responsible for meeting safeguard requirements. Placing obligations on the entity with operational control of the facility ensures that responsibility rests with the entity that is best placed to manage the facility’s emissions and take action to reduce them, if needed.

The safeguard mechanism will address the unique circumstances of the transport and waste sectors:

- *Transport*: To accommodate interstate transport operations, transport businesses will have the option to define their facilities on a national or state basis.
- *Waste*: Waste sector coverage will be limited to emissions from waste that is deposited at a landfill after scheme commencement (that is, after 1 July 2016). This will ensure that the safeguard mechanism does not retrospectively cover emissions from activities that occurred in the past.

Establishing baselines for existing facilities

The safeguard mechanism will ensure that emissions reductions purchased through the Emissions Reduction Fund are not displaced by a significant rise in emissions above business-as-usual levels elsewhere in the economy. It will achieve this by requiring large

¹ This estimate is based on emissions data reported under the National Greenhouse and Energy Reporting Scheme by corporations and other legal entities in 2013-14 and includes facilities forecast to exceed the threshold in 2014-15.

businesses to keep emissions below baseline levels. Baselines represent the reference point against which future emissions performance will be measured.

To avoid new reporting obligations, baselines will reflect absolute emissions using historical data reported under the National Greenhouse and Energy Reporting Scheme, also referred to as a report submitted under the Act. In particular, baselines will be set using the highest level of reported emissions for a facility over the historical period 2009-10 to 2013-14. Selecting the highest level of emissions over the five year period can help to accommodate natural variability in emissions associated with changes in production levels, plant maintenance or the types of inputs used.

Historical baselines provide a useful starting point for defining safeguard obligations. However, the safeguard mechanism is designed to accommodate economic growth and allow businesses to continue to operate at business-as-usual levels. There will be a range of circumstances which may require historical baselines to be adjusted to better reflect business-as-usual emissions performance. In particular, the safeguard mechanism will allow baseline adjustments to accommodate business growth, emissions variability associated with the extraction of natural resources and other circumstances where historical emissions are not representative of future emissions performance.

Accommodating business growth

To ensure that businesses have room to grow, historical baselines will be permanently increased to accommodate a significant expansion in production capacity. A significant expansion is defined as either an increase in maximum productive capacity of more than 20 per cent of a production variable that is already produced or the production of a new significant product, within three years, that results from the installation of new plant or equipment.

A significant expansion in maximum productive capacity represents a new investment at an existing facility. When a significant expansion occurs, the operator can apply to the Regulator to have the facility baseline adjusted in accordance with the rules for establishing baselines for new investments. This includes different treatment for projects which are already being planned or are under construction:

- *Pre-2020*: if a facility exceeds or expects to exceed its baseline due to a significant expansion *before* 1 July 2020, the operator may apply to revise the baseline using the *calculated-emissions baseline determination* approach in the safeguard rule. Under this approach, the Regulator may revise the baseline based on an emissions forecast provided by the facility operator, with an adjustment after the forecast period based on actual performance (referred to as a *production-adjusted baseline determination* in the safeguard rule). This method will be used to recalculate the baseline for the entire facility, not just the emissions associated with the significant expansion.
- *Post-2020*: if a facility exceeds or expects to exceed its baseline due to a significant expansion *after* 1 July 2020, the operator may apply to revise the baseline using the *benchmark-emissions baseline determination* approach in the safeguard rule. Under this provision, the Regulator may revise the facility's baseline using benchmark emissions

intensities from Schedule 1 to the safeguard rule. This approach will only apply to the emissions associated with the expanded capacity such that the facility's baseline would be the sum of its existing baseline and the benchmark baseline for the increased production resulting from the significant expansion.

An application for a baseline adjustment must be accompanied by an audit report providing assurance over the emissions and production estimates provided and that the significant expansion criteria have been met.

Emissions intensity test to accommodate incremental growth

The significant expansion rule applies where there is a significant and permanent increase in maximum productive capacity or the production of a new significant product at a designated large facility. There will also be instances where businesses grow incrementally over time. For example, businesses may increase production within existing plant capacity, or expand capacity by less than 20 per cent. In many cases, this growth will be accompanied by falling emissions intensity of production, delivering both economic and environmental benefits.

To accommodate incremental business growth and emissions efficiency, baselines will be temporarily increased in any year where baseline exceedance is accompanied by an emissions intensity improvement. A permanent adjustment would not be appropriate, as this could encourage businesses to temporarily shift production between facilities to progressively increase baselines at a number of different locations. While there may be limited opportunities to do this in practice, it is important to ensure that baselines do not expand beyond business-as-usual levels.

Facility operators who can demonstrate an emissions intensity improvement can apply to the Regulator for a temporary variation of their baseline. Current emissions intensity will be compared with the emissions intensity associated with the most recent baseline—including any temporary baselines—so that emissions intensity must be continuously improving to justify ongoing baseline adjustments.

Applications must be accompanied by an independent audit report. If successful, the facility's baseline will be increased for one year to be equal to covered emissions in that year.

The emissions intensity test will be reviewed in 2017 to determine its form and operation after 2020.

Baselines reflecting inherent emissions variability associated with existing natural resources and reserves

While an emissions intensity test will be effective for many businesses, some highlighted that rising absolute emissions are often not linked to falling emissions intensity. Some operations in the mining and oil and gas sectors can have highly variable emissions intensity, particularly the fugitive emissions associated with resource extraction. Further, resource grades are highly variable. Mines tend to move from higher to lower grade ores in the natural progression of operations, so that emissions may rise, even while production remains constant.

In the period to 2025, facility operators can apply for an adjustment to their baseline in circumstances where:

- the operation of a facility is associated with the extraction of a natural resource or reserve
- the properties of the resource or reserve have a direct effect on the emissions performance of a facility
- the facility has a limited ability to control for such emissions
- the facility has a calculated-emissions baseline or a reported-emissions baseline, and
- facility emissions have exceeded or are expected to exceed their baseline and the natural resource properties are the primary reason for this.

Baselines will be adjusted using the *calculated-emissions baseline* approach in the safeguard rule, whereby the Regulator may revise the facility's baseline based on an audited emissions forecast provided by the facility operator. A facility operator can reapply for a second calculated-emissions baseline, provided that the application relates to a forecast period beginning before 1 July 2025. New facilities that become covered by the safeguard after 1 July 2020 are not eligible for this baseline adjustment as they are expected to operate at best practice emissions intensity (referred to as a *benchmark-emissions baseline determination* in the safeguard rule).

Baseline adjustments where historical emissions are not representative of future emissions performance

There may be other circumstances where historical emissions are not a good indicator of future business-as-usual emissions performance. For example, many businesses reported low production in the baseline period due to depressed economic conditions following the global financial crisis.

To accommodate circumstances where historical emissions are clearly out of step with future emissions performance, a facility can apply for a baseline adjustment if its emissions exceed, or are expected to exceed, baseline levels in the first year of the safeguard mechanism's operation. The baseline will be increased to reflect an emissions forecast provided by the facility operator, using the *calculated-emissions baseline* approach.

The treatment of any increase in emissions that may occur as a result of the introduction of new regulation will need to be assessed by the Government at the time that any such regulation is introduced

Establishing baselines for new investments

New investments are expected to be a major contributor to emissions growth in the short to medium term, so it is important that they are included in the safeguard mechanism. However, it is not possible to establish historical baselines for new facilities as they lack an adequate data record.

In the absence of adequate historical data, the safeguard mechanism will aim to encourage businesses to achieve and maintain best practice in the design and implementation of new

operations. It will do so in a way that distinguishes between new projects that are already underway—and therefore have little scope to change their design and implementation—and entirely new endeavours. As such, the safeguard mechanism will include two approaches for developing baselines for new investments:

- *Pre-2020*: The calculated-emissions baseline approach will apply to new investments that are covered *before* 1 July 2020
- *Post-2020*: The benchmark-emissions baseline approach will apply to new investments that are covered *after* 1 July 2020.

Recently commissioned facilities that are already operational, but have insufficient data reported under the National Greenhouse and Energy Reporting Scheme to establish a historical baseline could choose to establish their baseline based on either:

- the calculated-emissions baseline approach for investments that are already underway
- the highest reported covered emissions of the limited data set between 2009-10 and 2013-14.

However, facilities that have submitted three reports where covered emissions are greater than 100,000 t CO₂-e in the 2009-10 to 2013-14 period are likely to have completed their ramp-up phase. These facilities must use historical data as a basis for setting their reported-emissions baseline.

Pre-2020: Calculated-emissions baseline approach

New facilities that have already taken their final investment decision, commenced construction or recently commenced operations may have little scope to change their design and implementation. The calculated-emissions baseline approach (referred to as ‘independent assessment’ approach during earlier consultation on the safeguard mechanism) will allow these facilities to establish a baseline that is more consistent with the treatment of existing facilities. Specifically, baselines for new investments that are in place before 2020 will be based on an audited emissions forecast provided by the facility operator.

The emissions forecast will comprise a forecast of production and emissions-intensity in the year with the highest level of production over the first three years of operation from when the calculated-emissions baseline is requested to start. This forecast period will be after the facility reaches the designated large facility threshold, which will help to ensure that the ramp-up phase of production has passed and the facility is in, or near, steady-state operations.

The emissions forecast period will be extended to five years for very large facilities, termed large new facilities, as they may take longer to reach steady state operations. Large new facilities are defined as facilities, which are not grid-connected electricity generators, whose annual covered emissions are expected to exceed two million t CO₂-e within five years after the facility’s calculated-emissions baseline starts. Grid-connected electricity generators reach steady state operation more quickly than other very large facilities.

After the forecast period, the baseline expires; however, a baseline may be replaced according to actual performance (referred to as a *production-adjusted baseline determination* in the safeguard rule). If the highest level of actual production over the relevant forecast period is different to the forecast, the baseline may be adjusted accordingly. The true-up is based on production, not emissions, to help avoid a perverse incentive to increase emissions during the forecast period to gain a higher baseline.

Applications to the Regulator must be accompanied by a report from a registered national greenhouse and energy auditor assessing the estimates, to provide the highest possible level of independent assurance of the reliability, accuracy and completeness of the underlying assumptions.

To further promote transparency, baseline applications must include a statement outlining how the operator intends to manage greenhouse gas emissions intensity and energy use at the facility. Where the estimate differs from publicly available information about expected production levels and emissions performance, the application should justify these differences. The Regulator must be satisfied that the justification is reasonable before making the baseline determination. Publicly available information may include Environmental Impact Statements or corporate reports for new facilities, and current emissions intensity performance of the facility for significant expansions.

Based on information provided by the facility operator and the auditor, the Regulator may set the baseline in accordance with the legislative rules.

Post-2020: Benchmark-emissions baseline approach

New investments that have not yet taken a final investment decision will be encouraged to perform at best practice. Best practice will be defined in a way that compares the relative performance of industry peers. Existing industry data will be used as a basis for developing benchmark emissions intensities that are representative of best practice. Where data is limited or not adequately representative—such as for small industries or industries that are new to Australia—international data or independent technical advice will help to define best practice.

The Department of the Environment will commence work on the development of these benchmark emissions intensities immediately following the making of the safeguard rule. The first tranche of benchmarks will be made by 31 December 2016.

How will the benchmark-emissions baseline be calculated?

Under the benchmark approach, the facility baseline will equal the aggregate of the baselines for each relevant production variable at the facility. The baseline for each production variable will be calculated as:

$$\begin{array}{l} \text{Baseline for each} \\ \text{relevant production} \\ \text{variable} \end{array} = \begin{array}{l} \text{Benchmark emissions} \\ \text{intensity of production} \end{array} \times \begin{array}{l} \text{Estimated} \\ \text{level of} \\ \text{production} \end{array}$$

The benchmark-emissions baseline will be calculated using the highest annual expected production over the first three years of operation above 100,000 t CO₂-e. After three years, baselines will expire and may be permanently adjusted to reflect the highest actual annual production over that period (referred to as a *production-adjusted baseline determination* in the safeguard rule).

Consistent with the treatment of large new facilities under the calculated-emissions baseline approach, the production forecast period will be extended to five years for very large facilities, which are not grid-connected electricity generators, whose annual covered emissions are expected to exceed two million t CO₂-e during the forecast period.

Emissions management

The safeguard mechanism includes an emissions management framework that gives businesses a range of options for meeting safeguard obligations, including:

- Offsets: a ‘net emissions’ approach will allow businesses to use ACCUs to offset emissions
- Multi-year monitoring: allowing a business to exceed its baseline in one year, so long as average emissions over two or three years are below baseline
- Exceptional circumstances: an exemption for facilities whose emissions are the result of exceptional circumstances, such as a natural disaster
- Enforcement options: a range of discretionary, graduated enforcement options to deter non-compliance.

Net emissions and carbon offsets

A number of businesses currently participate in voluntary carbon neutral programmes and use carbon credits to offset their emissions. This means that businesses with few in-house emissions reduction options can offer their customers carbon neutral products and services by purchasing credits from businesses that can reduce emissions relatively cheaply. For example, airlines cannot avoid burning aviation fuel, but they can give passengers the option to offset the emissions associated with their flight.

The safeguard mechanism will provide a similar option to participants, giving them additional flexibility in meeting safeguard obligations. Designated large facilities must keep net emissions—defined as actual emissions less offsets—below baseline levels. Facility operators can surrender eligible carbon offsets at any time to remain below baseline levels.

Credits issued under the Emissions Reduction Fund—also known as Australian Carbon Credit Units (ACCUs)—will be eligible offsets under the safeguard mechanism.

The role of high quality international units in the safeguard mechanism will be reviewed in 2017 and align with the broader review of the Emissions Reduction Fund, subject to accounting rules to be agreed as a result of the United Nations Framework Convention on

Climate Change meeting in Paris in December 2015 and the credibility of the system for purchasing international units.

Avoiding double counting

Safeguard entities are eligible to participate in the Emissions Reduction Fund crediting and purchasing mechanisms, in the same way as other businesses. They can create ACCUs from eligible emissions reduction projects undertaken at their facility.

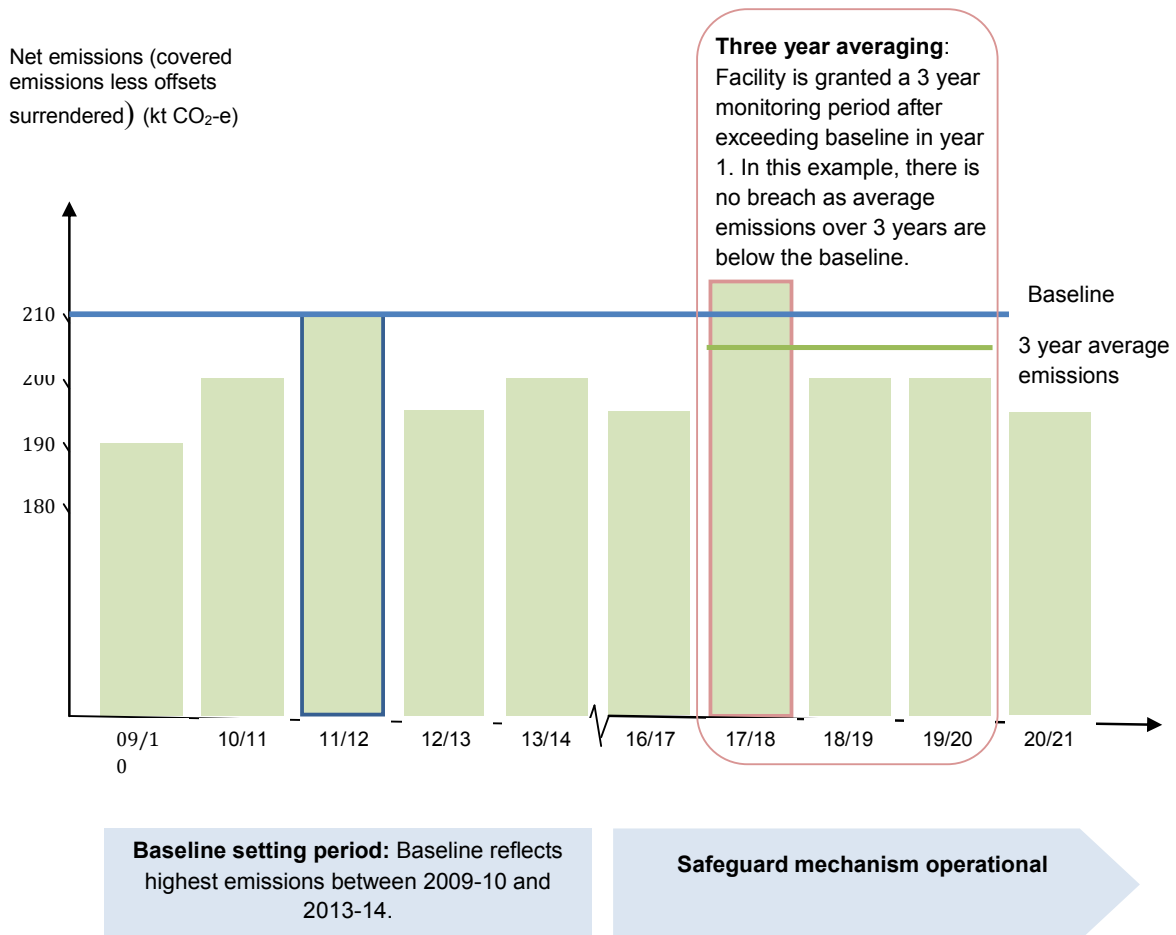
The Emissions Reduction Fund legislation ensures that emissions reductions created at designated large facilities cannot be counted more than once, to ensure the integrity of the mechanism. It does this by adding ACCUs issued for abatement at the facility back on to that facility's net emissions. If the facility then uses the ACCUs as an offset under the safeguard, or sells them to the Regulator under a carbon abatement contract, the facility's net emissions are correspondingly reduced.

Multi-year period declaration

To accommodate natural variability, participants will have access to multi-year averaging—whereby a facility could exceed its baseline in one year, so long as average emissions over multiple years remain below the baseline.

The maximum declared multi-year period will be three years, giving businesses sufficient time to implement emissions reduction projects, acquire offsets or help capture natural peaks and troughs in emissions. The operation of the multi-year period declaration is illustrated in Figure 2.

Figure 2—Operation of multi-year averaging



Responsible emitters can apply for a declared multi-year period where there is a reasonable expectation that a facility's emissions will exceed its baseline. Applications will be assessed by the Regulator, having regard to:

- whether the responsible emitter has previously met all its safeguard requirements, and
- whether the responsible emitter has provided satisfactory evidence that the emissions could be returned to baseline levels over an extended period.

If satisfactory evidence is not available, the responsible emitter has the option to enter into an enforceable undertaking to implement measures to return emissions to baseline levels over the extended period. Choosing to enter an enforceable undertaking could support the Regulator's decision to make the declaration for the situation, where for example, the responsible emitter has a history of non-compliance.

Exemptions for exceptional circumstances

The Regulator may disregard emissions increases linked to an exceptional event, namely a natural disaster or criminal activity, and exempt the facility from its safeguard obligation for a defined period of time.

To encourage the responsible management of emissions, even under exceptional circumstances, the Regulator will consider whether reasonable steps were taken to mitigate the risk of excess emissions arising from the exceptional event, both before and after its occurrence.

Exemptions will not apply to events that reflect normal market dynamics or as a mechanism for addressing drivers of emissions variation, such as changes to price, production inputs and outputs, or maintenance.

Enforcement options

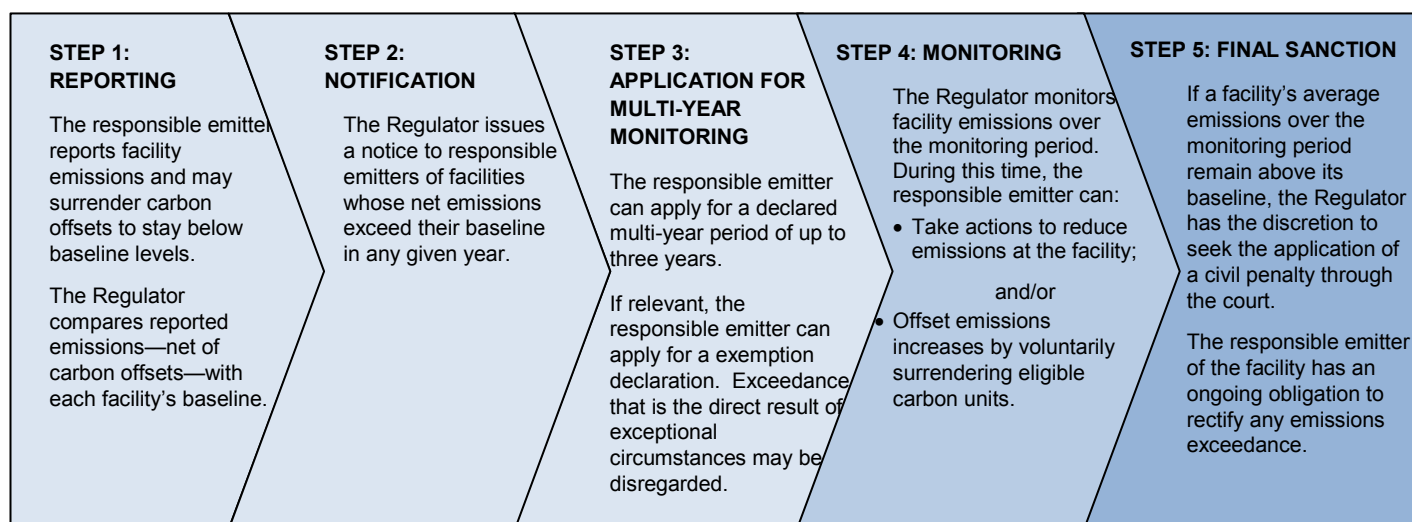
Safeguard requirements must be enforceable to ensure that the mechanism is effective. The Regulator has access to a range of graduated enforcement options to encourage operators to comply with their safeguard obligations.

Enforcement options available to the Regulator include issuing infringement notices, accepting enforceable undertakings and seeking injunctions to rectify an emissions exceedance. The final sanction is a civil penalty that could be imposed by a court, with the maximum amount set at the lesser of 100 penalty points per day (currently \$18,000 per day), to a maximum of 10,000 penalty points in total. Despite paying the penalty, the responsible emitter of the facility has an ongoing obligation to rectify any emissions exceedance. The Regulator has discretion over which enforcement options are most appropriate in circumstances of non-compliance, including whether to pursue court action.

The civil penalty is designed to encourage compliance, not raise revenue. It is a last resort and will never apply to businesses that meet legislated safeguard requirements. The presence of such a penalty is standard practice in Commonwealth legislation.

Figure 3 presents an overview of the operation of the safeguard mechanism, including scope for a multi-year monitoring period, an exemption for emissions linked to exceptional events and a civil penalty as a final sanction.

Figure 3—Safeguard mechanism compliance process



Electricity sector

A sectoral approach is taken to the coverage of grid-connected electricity generators, which is defined to include the following five electricity grids: the National Electricity Market, the South West Interconnected System, the North West Interconnected System, the Darwin-Katherine Interconnected System, and the Mount Isa–Cloncurry Supply Network. A sectoral-baseline, equal to 198 million tonnes CO₂-e, applies to all grid-connected electricity generators. This baseline has been worked as the sum of the scope 1 emissions from grid-connected generators in 2009-10.

The Regulator will publish a statement on its website that the sectoral-baseline has been exceeded in the year after the exceedance has occurred. Individual grid-connected generators are not covered up to and including each year that the Regulator publishes this statement.

Individual baselines, set at each facility's highest annual emissions between 2009-10 and 2013-14, will apply to grid-connected generators when the sectoral-baseline no longer applies. Grid-connected generators will have access to the same general baseline adjustment and emissions management options as facilities in other sectors, other than in the following areas:

- *initial calculated-emissions baselines*: grid-connected electricity generators are not eligible to apply to adjust their baseline if their individual emissions exceed their individual baselines in the first year of the safeguard mechanism. This is because grid connected generators are included in the sectoral approach. In addition, entities in control of multiple generators have the ability to shift production between generators in order to satisfy the initial calculated-emissions baseline criteria.
- *duration of calculated-emissions and benchmark-emissions baseline determinations*: new grid-connected generators are not eligible for an extended forecast period of five years when calculating baselines under the calculated-emissions approach or the benchmark-emissions approach, even if they meet the criteria of a large new facility. The extended forecast period is intended to address longer lead times to reach full production that occur in other sectors of the economy.

Other than the differences described above, baselines for new grid-connected generators will be set in a manner that is consistent with other sectors.

The approach to the electricity sector, and the arrangements that apply once the sectoral-baseline is exceeded, will be reviewed in 2017.

Administration

Administrative arrangements will be consistent across all elements of the Emissions Reduction Fund. The Government will make decisions about the design of the safeguard mechanism. Through the Minister for the Environment, the Government will be responsible for making the rules that will guide its operations.

The Regulator will administer the safeguard mechanism and apply its rules, including managing the compliance of covered businesses. In general, determinations and declarations made by the Regulator are subject to review by the Administrative Appeals Tribunal.

The Regulator currently administers the National Greenhouse and Energy Reporting Scheme and has the required expertise to perform the administrative functions associated with the safeguard mechanism.

Publication of information

To ensure that information about the effectiveness of the safeguard mechanism is available to the public, the Regulator will publish regular information about its operation, including the following information:

- facilities covered by the safeguard mechanism
- baseline determinations for each facility
- net emissions, covered emissions and surrendered offsets for each facility
- for facilities that have a multi-year monitoring period, the start and end date of that monitoring period
- operators whose emissions over the monitoring period exceed their baseline
- facilities declared exempt from safeguard obligations due to exceptional circumstances.

The approach to publication of information under the safeguard mechanism is to ensure that commercially sensitive data is not published, but sufficient data is released to allow the public to assess progress against safeguard mechanism objectives.

Review

The Emissions Reduction Fund – including crediting, purchasing and the safeguard mechanism – is a core component of the policy suite to meet Australia’s emissions reduction target of 26-28 per cent below 2005 levels by 2030. The Government considers it appropriate that the mechanism be reviewed on an ongoing basis to ensure that it makes an effective contribution to Australia’s emissions reduction target.

A review of the operation of the safeguard mechanism will commence by 30 June 2017 and report by 15 November 2017 covering the following elements:

- the operation of the safeguard mechanism in concert with the crediting and purchasing elements of the Emission Reduction Fund
- the effectiveness of the baseline setting approach for new investments already underway
- the transition to the best practice framework for new investments
- any conditions and criteria for existing facilities to adjust baselines

- the role of the crediting, purchasing and safeguard mechanism elements of the Emission Reduction Fund in conjunction with the broader suite of emission reduction policies to meet the 2030 target
- an examination of how different sectors, including the electricity sector, are to be treated.

Part 1

Preliminary

Outline of the Part

- 1.1 This Part describes the name, commencement and authority for making the safeguard rule. It also defines key terms used in the safeguard rule.
- 1.2 The type of information found in Part 1 of the safeguard rule is typically generic for all legislative instruments. The section on definitions is however specific to the safeguard rule and essential for understanding the requirements set out in subsequent parts.

Sections 1, 2, 3: Name, Commencement, Authority

- 1.3 The name of the safeguard rule is the *National Greenhouse and Energy Reporting (Safeguard Mechanism) Rule 2015*. *[section 1]*
- 1.4 The safeguard rule will commence on 1 July 2016. *[section 2]*
- 1.5 The safeguard rule will be made under subsection 22XS(1) of the *National Greenhouse and Energy Reporting Act 2007*(the Act). *[section 3]*

Section 4: Definitions

- 1.6 Unless taken from the Act, the terms used in the safeguard rule are defined in section 4. *[section 4]* Terms used in the Act relevant to the safeguard rule include: baseline emissions number, carbon dioxide equivalence, covered emissions, designated large facility, excess emissions situation, net emissions number, monitoring period, responsible emitter and scope 1 emission.

Electricity sector definitions

- 1.7 ***Sectoral-baseline financial year, designated electricity network and grid-connected electricity generator*** are definitions specific to the electricity sector. They are explained in the section headed *Coverage of grid-connected electricity generators* on page 34 of the Explanatory Statement.

Production variable related definitions

- 1.8 The concept of a **production variable**, which is generally the quantity of an output, intermediate product or input, is central to the emissions intensity test as well as the determination of a baseline emissions number under most baseline determinations (not reported-emissions baselines). For a calculated-emissions baseline determination, and a production-adjusted baseline determination that follows a calculated-emissions baseline, production variables are worked out for a facility under section 5. For facilities with a reported-emissions baseline determination, the emissions intensity test is also performed using production variables worked out under section 5. For benchmark-emissions baseline determinations and production-adjusted baseline determinations that do not follow a calculated-emissions baseline, the Benchmark Emissions-Intensity Index, in Schedule 1, will set out what the relevant production variables for a facility will be for both working out the baseline emissions number and performing the emissions intensity test.
- 1.9 The emissions intensity of certain production variables and the quantity of those production variables in a given year are used to calculate the baseline emissions number in three types of baseline determinations:
- calculated-emissions baseline determinations
 - benchmark-emissions baseline determinations
 - production-adjusted baseline determinations.
- 1.10 Calculated-emissions and benchmark-emissions baseline determinations use estimates of future production for these calculations, whereas the production-adjusted baseline determination uses historical production from the period covered by a calculated-emissions or benchmark-emissions baseline determinations, as a ‘true-up’ to calculate a final baseline determination.
- 1.11 The production variable related definitions are broadly consistent with the *Carbon Credits (Carbon Farming Initiative—Facilities) Methodology Determination 2015* (the facilities method).

Input

- 1.12 In relation to landfill facilities, **input** is defined as a tonne of waste received by a landfill facility. A tonne of waste received at a landfill facility can also be identified as the facility’s production variable in accordance with section 5 of the safeguard rule. This is because landfills do not produce an output (as described below) and there is a relationship between a landfill facility’s emissions and the amount of waste it receives.
- 1.13 In relation to facilities other than landfill facilities, input is defined as anything that undergoes a chemical or physical process to produce an intermediate product or an output. Examples of an input are crude oil and iron ore. A facility’s input may be identified as the facility’s production variable in accordance with section 5.

Output

- 1.14 In relation to transport facilities, **output** is defined as a transport service measured by **service units**, which is defined in section 4 of the safeguard rule and include units such as vehicle kilometres travelled (vkt).
- 1.15 Where facilities produce less than 25,000 megawatt hours of electricity in a financial year, this production is not considered to be an output. This is intended to exclude minor or trivial amounts of electricity generated, for example, by a small onsite generator at a facility used as a back-up power source.
- 1.16 In relation to all other cases, output is defined as the last product resulting from a chemical or physical process undertaken by a facility using one or more inputs or intermediate products. Examples of an output could include aluminum ingots, coal and glass sheets.

Intermediate product

- 1.17 **Intermediate product** is defined as a product that results from a chemical or physical process undertaken by a facility using one or more inputs and is then used as an input for the production of an output at the same facility.

For example, primary nickel is produced from mineralised nickel ore. This primary nickel may be sold without further processing or subsequently refined into higher grades of nickel metal to be sold as different outputs. Primary nickel would be the intermediate product.

Output variable

- 1.18 An **output variable** is an output (as defined above) that is the last saleable output or outputs of a production process which results in an increase (or decrease) in covered emissions from a facility when there is an increase (or decrease) in the quantity of that output.
- 1.19 Unless certain exceptions apply, a facility's output variable(s) will generally be its production variable(s) (see the section headed *Section 5: Identification of production variables* on page 25 of the Explanatory Statement).
- 1.20 In relation to facilities where electricity generation is the only output, the output variable is defined as the quantity of electricity exported from the facility measured in megawatt hours.
- 1.21 For facilities that generate electricity as one of two or more outputs, the output variable for electricity is defined as the quantity of electricity generated at the facility, rather than the quantity exported. This is to ensure that emissions from electricity used onsite to make other production variables are also accounted for.
- 1.22 In relation to transport facilities, output variable is defined as the quantity of service units.
- 1.23 An output variable is defined as the quantity of a product that is produced or processed at a facility, provided that these criteria are all met:

- the product is the last saleable output from a chemical or physical process undertaken by the facility
- an increase in the production or processing of the product would result in an increase in greenhouse gas emissions from the facility, and a decrease would result in a decrease in emissions
- the quantity of the product can be expressed in a unit of measurement that complies with the *National Measurement Act 1960*, and
- the product is not an intermediate product, a by-product or a waste product.

1.24 The definition of output variable is intended to result in estimates of a facility's level of production that are accurate and can be related to emissions produced by the facility.

Transport service unit definitions

- 1.25 Examples of **service units** which relate to a transport facility are *dwt nmi*, *m³ km*, *pkm*, *pnmi*, *tkm*, *tnmi*, *vkt* or *askm*. Service units define how to measure the product or output for different types of transport. They are determined and measured by the responsible emitter for the facility taking into account:
- standard industry practice
 - existing measurement systems used by the responsible emitter.

References to legislative instruments

- 1.26 The definitions reference a number of legislative instruments, including the *National Greenhouse and Energy Reporting (Measurement) Determination 2008*, *National Greenhouse and Energy Reporting Regulations 2008* and *National Greenhouse and Energy Reporting (Audit) Determination 2009*. These references are to those instruments as in force from time to time, consistent with section 10 of the *Acts Interpretation Act 1901* as applied by section 13 of the *Legislative Instruments Act 2003*. Similarly, references to these legislative instruments elsewhere in the safeguard rule is to those instruments as in force from time to time.

Section 5: Identification of production variables

- 1.27 Production variables must be identified in accordance with the rules in section 5. *[subsection 5(1)]* The identification of production variables is for the purposes of determining calculated-emissions baselines and assessing whether a facility is eligible for a variation of a baseline determination because of a reduction in emissions intensity.

Note that these rules are similar to those used in the facilities method under the Emissions Reduction Fund. However, the application of the rules to a facility may differ as the facilities method includes both scope 1 and 2 emissions whereas the safeguard mechanism only deals with scope 1 emissions.

- 1.28 The rules in section 5 are not relevant to benchmark-emissions baseline determinations or to production-adjusted baseline determinations that do not follow a calculated-emissions baseline determination, because in these cases the relevant production variables are instead defined in the Benchmark Emissions-Intensity Index in Schedule 1 of the safeguard rule.
- 1.29 If a facility has only one output variable, then that variable is the production variable for the facility. *[subsection 5(2)]*
- For example, if a facility produces 4,000 tonnes of zinc in 2016-17 and nothing else, the production variable for the facility in 2016-17 is 4,000 tonnes of zinc.
- 1.30 If a facility has more than one output variable, then each of those variables is a production variable unless an exception applies. *[subsection 5(3)]*

Similar output variables

- 1.31 If two or more of a facility's output variables are measured in the same units, and the emissions per unit of the output variables are materially similar, then the sum of the similar variables may be treated as a single production variable. *[subsection 5(4)]*

For example, if a facility produces 3,000 tonnes of zinc, 2,000 tonnes of lead and 1,000 tonnes of copper in 2016-17, and emissions from each tonne of zinc, lead and copper are materially similar, then the production variable for the facility in 2016-17 is 6,000 tonnes of zinc/lead/copper.

However, a facility that produces two different grades of zinc— 2,000 tonnes of 99.5% grade zinc and 500 tonnes of 99.9% grade zinc—and the emissions per unit of these two grades are not materially similar. The facility is therefore not able to sum the quantities to treat as a single production variable.

Inputs and intermediate products

- 1.32 For some facilities, such as oil refineries and natural gas processing facilities, inputs or intermediate products may be better measures of production than output variables. However, if the facility operator wishes to take an input or intermediate product to be the facility's production variable, then (unless the facility has no discernible output) the input or intermediate product must meet the following requirements *[paragraphs 5(5)(b), 5(6)(c) and 5(7)(d)]*:

- either the outputs are produced in a fixed proportion to the input or intermediate product, or each output can be quantified using the same unit of measurement and the covered emissions of each output are materially similar, unless the facility is a petroleum refinery or natural gas processing or liquefaction facility *[paragraph 5(8)(a)]*. Fixed proportion is defined in section 4 of the safeguard rule and means a proportion that varies by less than five per cent.
- an increase in the quantity of the input or intermediate product used by the facility to produce the outputs would result in an increase in covered emissions, and a decrease in the quantity would result in a decrease in covered emissions *[paragraphs 5(8)(b) and (c)]*

- omitting the input or intermediate product from the process would either prevent the outputs of the process from being produced *[subparagraph 5(8)(d)(i)]* or change the covered emissions of a facility by more than five per cent *[subparagraph 5(8)(d)(ii)]*
- the quantity of the input or intermediate product can be expressed in a unit of measurement that complies with the *National Measurement Act 1960* *[paragraph 5(8)(e)]*
- the input or intermediate product is not used as a fuel for producing energy at the facility, unless the facility is a petroleum refinery or natural gas processing or liquefaction facility *[paragraphs 5(8)(g)],* and
- if the facility is a petroleum refinery or natural gas processing or liquefaction facility then the input or intermediate product is primarily used as an input to a production process. *[paragraph 5(8)(f)]*

1.33 For the purposes of this section and section 25, a natural gas processing facility is intended to include a facility which processes raw natural gas into natural gas which can be injected into a pipeline.

Single input or intermediate product

1.34 If a single input or intermediate product is used to produce all of a facility's outputs, then the facility operator may choose the quantity of the input or intermediate product to be the facility's production variable. *[subsection 5(5)]*

For example, if a petroleum refinery produces multiple products but its only input is crude oil, then the quantity of crude oil used to make the facility's products can be the facility's production variable.

Multiple inputs or intermediate products and one input or intermediate product chosen as the production variable

1.35 If two or more inputs, or two or more intermediate products, are used to produce all of a facility's outputs and the inputs or intermediate products are used in a fixed proportion to one another (meaning a proportion that varies by less than five per cent), then one of those inputs or intermediate products may taken to be the facility's production variable. *[subsection 5(6)]*

For example, if a steel mill produces multiple products from iron ore and other inputs, and the iron ore and other inputs are used in a fixed proportion to one another, then the quantity of iron ore used to make the facility's products can be the facility's production variable.

Multiple inputs or intermediate products and sum of multiple inputs or intermediate products chosen as the production variable

1.36 If:

- two or more inputs or intermediate products are used to produce all of a facility's outputs
- two or more of those inputs or intermediate products can be quantified using the same unit of measurement

- the covered emissions from those inputs or intermediate products are materially similar (see subsection 5(12) of the safeguard rule),

then the quantity of those inputs or intermediate products may be taken to be the facility's production variable. *[subsection 5(7)]*

For example, if a steel mill produces multiple stainless steel products from iron ore, nickel and other inputs, and the iron ore and another input can be quantified using the same unit of measurement and have materially similar emissions (within the meaning of subsection 5(12)), then the sum of the quantities of iron ore and this other input used to make the facility's products can be the facility's production variable. Nickel cannot be included in the production variable because it is likely to have a much higher emissions intensity. This provision is intended mainly for facilities that produce a number of products from a number of similar inputs or intermediate products.

If no discernible output exists

- 1.37 If a facility has no discernible output that meets the definition for being an output variable (as defined in section 4 of the safeguard rule), then the quantity of one or more inputs, intermediate products or non-saleable outputs may be identified as a production variable for the facility. *[subsection 5(9)]*

For example, landfill facilities have no discernible output as defined here. They instead use a tonne of waste received at the landfill as their production variable.

- 1.38 Production variables identified in this way may be grouped together if the provisions set out in subsection 9(4) are met. *[paragraph 5(9)(d)]*

If emissions-intensive trade-exposed activities conducted

- 1.39 If a facility carries out one or more ***emissions-intensive trade-exposed activities*** (as defined in the *Renewable Energy (Electricity) Act 2001*), then production variables for the facility may be identified as the quantity of relevant products that are defined in Part 3A of the *Renewable Energy (Electricity) Regulations 2001* as in force from time to time. *[subsection 5(10)]*

- 1.40 The products specified under these Regulations are specified for working out the emissions intensity of production from ***emissions-intensive trade-exposed activities***. The quantity of these products are suitable to be production variables for the safeguard mechanism because designated large facilities are likely to carry out an emissions-intensive trade-exposed activity, and the products were also defined for the purpose of working out emissions intensities. These include what would otherwise be inputs, intermediate productions and outputs measured to the particular standards specified under the regulations. All such relevant products at a facility would need to be used if this option was utilised. However, electricity related output variables will still need to be identified separately from any relevant products (and thus will also be production variables for the facility).

Meaning of ‘materially similar’—two output variables

- 1.41 Emissions per unit of production of two output variables or outputs are materially similar if the average emissions per unit of production of one of those variable or outputs during the relevant comparison period (see subsection 5(13) of the safeguard rule) is expected to be no more than five per cent greater than the average emissions per unit of production of the other variable or output during that period. *[subsection 5(11)]*

Meaning of ‘materially similar’—similar inputs and intermediate products

- 1.42 The covered emissions produced by a facility for each unit of the facility’s similar inputs or intermediate products are ‘materially similar’ if the average covered emissions per unit of one of the similar inputs or intermediate products used during the relevant comparison period is no more than five per cent greater than the average covered emissions per unit of any other similar input or intermediate product used in the relevant comparison period. *[subsection 5(12)]*
- 1.43 The ‘relevant comparison period’ is the first three years of a calculated-emissions baseline determination if the production variable is being identified for the purposes of a calculated-emissions baseline determination. *[paragraph 5(13)(a)]*
- 1.44 If the production variable is being identified for the purposes of the emissions intensity test (see section 46 if the safeguard rule), the relevant comparison period is the year for which the baseline variation is sought and the most recent baseline intensity comparison year. *[paragraph 5(13)(b)]* That is, to ensure that the emissions intensity of production is calculated accurately, the output variables, inputs or intermediate products must be materially similar in both the baseline intensity comparison year and the year for which the variation is sought.

Section 6: Emissions-intensity calculation criteria

- 1.45 The emissions intensity of production variables is calculated for the purposes of making calculated-emissions baselines and assessing whether a facility is eligible for a variation of a baseline determination because of a reduction in emissions intensity.
- 1.46 The emissions intensity of a production variable must be calculated in accordance with the rules in section 6. The calculation must meet requirements, which are set out in subsections (2) to (8), and take into account the principles which are set out in subsections (9) to (11). *[subsection 6(1)]* Differentiating requirements from principles is significant for determining if emissions intensity has been correctly calculated. In taking into account the principles in subsections (9) to (11) it is recognised that individual circumstances may mean that the principle cannot be met, but the calculation should get as close to the relevant principle as is practicable.

Requirements

- 1.47 The calculation of emissions intensity must only include covered emissions. *[subsection 6(2)]* The safeguard mechanism only applies to a facility's covered emissions.
- 1.48 The total covered emissions of the facility are used to calculate the one or more emissions intensities. If there is only one production variable, then its emissions intensity is calculated simply by dividing the total covered emissions of the facility by the production variable. If there are two or more production variables—the total covered emissions of the facility are apportioned between each production variable and then the emissions apportioned to each production variable are divided by that production variable. *[subsections 6(3) and 6(4)]*
- 1.49 Emissions intensity must be expressed in tonnes of carbon dioxide equivalence (t CO₂-e) per unit of the production variable, noting that the production variable may combine both a unit and a quantity. *[subsection 6(5)]*

For example, if a facility's production variable is 4,000 tonnes of zinc, then the unit is 'tonne'. The emissions intensity of the facility's zinc production must therefore be expressed in t CO₂-e per tonne of zinc.

- 1.50 If the emissions intensity is being worked out for the purpose of making a calculated-emissions baseline determination, then if a greenhouse gas other than carbon dioxide has, or is reasonably likely to, contribute more than one per cent of the expected covered emissions in the financial year being considered, the emissions intensity of that gas must be separately identified per unit of production variable. *[subsection 6(6)]* This provision ensures that emissions intensity is calculated accurately by fully taking into account significant covered emissions sources and the baseline can be updated should the global warming potential of the relevant greenhouse gas change in the future. A source of information for working out if this one per cent threshold is met, or likely to be met, is the data contained in reports submitted under the Act. This is not required for the emissions intensity test where two emissions intensity are compared and are not used to determine a baseline emissions number.
- 1.51 The calculation of emissions intensity of a greenhouse gas must measure and apportion emissions in a manner that is consistent with the *National Greenhouse and Energy Reporting (Measurement) Determination 2008* (NGER (Measurement) Determination). *[subsection 6(7)]* This provision ensures that emissions intensity is determined consistently with how emissions are reported under the Act, in a way that is familiar to the Regulator and national greenhouse and energy auditors.
- 1.52 The emissions intensity of each production variable must fairly represent the actual emissions attributable to the production variable. *[subsection 6(8)]*

For example, covered emissions should not be attributed to a production variable when in fact they could with greater or equal justification be attributed to a different production variable identified in accordance with the rules in section 5.

Principles

- 1.53 If an emissions source could be attributed to the emissions intensity of two or more production variables, then covered emissions from that source should be apportioned between the variables. As a principle, the sum of the emissions apportioned to each variable in any year to be covered by a baseline determination should be no more than five percent greater than the total expected covered emissions from that source:

- if production variables are being identified for a calculated-emissions baseline determination— during the first three years of that baseline determination, and
- if production variables are being identified for a variation of a baseline determination under subsection 51(2) and the facility is not a benchmark facility—during both the financial year for which the baseline emissions number is to be varied and the most recent baseline intensity comparison year. *[subsection 6(9)]*

For example if a facility combusts coal in the process of producing two production variables – Widget A and Widget B. In 2017-18 the facility produced 100,000 tonnes of Widget A and 50,000 tonnes of Widget B. Total emissions in 2017-18 were 200,000 t CO₂-e from coal combustion but the heat from the coal combustion was used to produce both Widget A and Widget B. The total covered emissions attributable to each production variable is estimated to be 100,000 t CO₂-e for both Widget A and Widget B. The emissions-intensity of the output variables are therefore 1 t CO₂-e per tonne of Widget A and 2 t CO₂-e per tonne of Widget B. *[subsection 6(4)]* In the first year of the calculated-emissions baseline the covered emissions at the facility are estimated to be 210,000 t CO₂-e, due to the combustion of coal and the facility produced 120,000 tonnes of Widget A and 55,000 tonnes of Widget B. The sum of the covered emissions apportioned to each output variable is 230,000 t CO₂-e (120,000 t CO₂-e + 110,000 t CO₂-e), which is 9.5 per cent greater than the total covered emissions from coal combustion. Because the difference is more than 5 per cent the emissions apportioning should be recalculated to see if the per cent difference can be reduced. *[subsection 6(9)]*

- 1.54 This principle helps prevent the overestimation of emissions by apportioning emissions between different output variables for one mix of output variables and then calculating or estimating emissions for a different mix of the same output variables.
- 1.55 The method used to calculate the emissions intensity of a facility's production variable should be consistent with the method used in any previous successful application for a baseline determination or variation in relation to that facility. *[subsection 6(10)]* This provision helps ensure that the emissions intensity calculation captures actual changes in emissions intensity rather than changes in the method used to calculate emissions intensity. This may not be practicable if the production variables have changed.

- 1.56 The apportionment of emissions to individual production variables should be free of bias that may lead to an overestimate of emissions to be covered by the baseline determination or variation resulting from changes in the relative mix of production variables. *[subsection 6(11)]* This provision expands on the rule that emissions should be apportioned fairly between production variables (see subsection 6(9)).

Part 2

Coverage

Outline of the Part

- 2.1 This Part describes the type of greenhouse gas emissions and type of facility to be covered by the safeguard mechanism.
- 2.2 There are several definitions of greenhouse gas emissions under the Act and its subordinate legislation (such as scope 1 emissions, scope 2 emissions, direct emissions and in the case of landfills, legacy and non-legacy emissions). The meaning of covered emissions set out in the safeguard rule are those particular emissions of a designated large facility, as defined under section 22XJ of the Act, that are to be measured, reported and managed under the safeguard mechanism.

Section 7: Covered emissions

- 2.1 The safeguard mechanism is concerned with the management of certain kinds of greenhouse gas emissions, termed ‘covered emissions’. Covered emissions are defined within the Act, under section 22XI, as scope 1 emissions of one or more greenhouse gases other than emissions of a kind specified by the safeguard rules.
- 2.2 Under the safeguard mechanism, a facility’s covered emissions are quantified to determine its net emissions numbers and baseline emissions numbers—data points that form the basis for emissions management.
- 2.3 Scope 1 emissions are emissions resulting directly from an activity or series of activities (including ancillary activities) that constitute a facility as defined under section 2.23 of the *National Greenhouse and Energy Reporting Regulations 2008* (NGER Regulations). Scope 1 emissions may be referred to as direct emissions. Scope 1 emissions include emissions resulting from fuel combustion, physical and chemical processes, and fugitive emissions.
- 2.4 The Act allows for the safeguard rule to specify certain kinds of scope 1 emissions to be disregarded (not covered) under the safeguard mechanism. According to the safeguard rule, the following emissions are not covered under the mechanism:
 - Emissions in circumstances where the Minister has not determined methods or criteria for methods to measure the scope 1 emissions. *[paragraph 7(1)(a)]* These are currently not reported under subsections 19(1A), 22G (1A) and 22X (3) of the Act.
 - Legacy emissions from the operation of a landfill facility, which are the emissions attributable to waste accepted by a facility before 1 July 2016. *[paragraphs 7(1)(b), 7(2)(a), and 7(2)(b)]*

- Emissions from the operation of either grid-connected electricity generators or connected to a designated electricity grid generators in a sectoral-baseline year, which is every financial year up to and including the financial year in which the Regulator publishes a statement on its website that the sectoral-baseline has been exceeded. *[paragraph 7(1)(c)]*
- Emissions that occurred within the Greater Sunrise unit area or Joint Petroleum Development Area (which may represent the whole or a portion of a facility's total emissions). *[paragraph 7(1)(d)]* This supplements the existing exclusion of facilities wholly in the Greater Sunrise unit area or Joint Petroleum Development Area provided by subsection 6A(2) of the Act.

Coverage of grid-connected electricity generators

- 2.5 A sectoral approach is taken to the coverage of grid-connected electricity generators. Emissions from grid-connected electricity generators are not covered as long as the sector aggregate emissions do not exceed the sectoral-baseline.
- 2.6 The sectoral-baseline is equal to 198 million tonnes of carbon dioxide equivalence (Mt CO₂-e). It has been calculated as the sum of the sector's emissions in the 2009-10 financial year. Each year, the Regulator will monitor scope 1 emissions from all grid-connected electricity generators. The Regulator must take all reasonable steps to publish a statement on its website, including if the sum of emissions exceeds the sectoral-baseline, by 28 February of the financial year following when the sectoral-baseline has been exceeded. To avoid doubt, this statement is not a legislative instrument.
- 2.7 Every financial year up to and including the financial year in which the Regulator publishes the statement on its website is referred to as a ***sectoral-baseline financial year***. Scope 1 emissions from grid-connected electricity generators will remain uncovered for every sectoral-baseline financial year. In other words, these emissions will start to be covered in the financial year after the Regulator publishes the statement on its website. *[subsection 7(1)(c)]*
- 2.8 ***Grid-connected electricity generators*** are defined as designated generation facilities that are connected to a designated electricity network at any time during a financial year. Designated generation facilities are defined under section 7 of the Act in relation to item 54 of Schedule 2 to the NGER Regulations. The Regulator publishes scope 1 emissions from all designated generation facilities after the end of each financial year.
- 2.9 ***Designated electricity network*** is defined to include the following five electricity grids: the National Electricity Market, the South West Interconnected System, the North West Interconnected System, the Darwin-Katherine Interconnected System, and the Mount Isa–Cloncurry Supply Network.

Example: A grid-connected generator is advised that its individual reported-emissions baseline emissions number is 150,000 t CO₂-e. The generator will not face an obligation though until the sectoral-baseline of 198 Mt CO₂-e is exceeded.

If in 2016-17, the sum of emissions from grid-connected generators is 190 Mt CO₂-e, and therefore lower than the sectoral-baseline of 198 Mt CO₂-e. The year is classified as a sectoral-baseline financial year and the generator's covered emissions are zero.

If, in 2017-18, the sector's emissions are 210 Mt CO₂-e then the sectoral-baseline would be exceeded. The year of the exceedance would be classified as a sectoral-baseline financial year covered emissions in that year would be equal to zero. By 28 February in the 2018-19 financial year, the Regulator would publish a statement that the sectoral-baseline has been exceeded. This year would also be classified as a sectoral-baseline financial year and covered emissions from the facility would be equal to zero.

Therefore 2019-20 would be the first year that is not a sectoral-baseline financial year. If in this year, the generator's individual covered emissions are 145,000 t CO₂-e, which would be below the generator's baseline emissions number of 150,000 t CO₂-e, the generator would not have an excess emissions situation for that year.

Section 8: Designated large facility threshold

- 2.10 The safeguard mechanism's coverage approach places emissions management obligations on the operators of a limited number of facilities responsible for a significant proportion of the Australian economy's emissions. A facility that is covered under the safeguard mechanism is described by the Act as a 'designated large facility', meaning a facility that emits more than a certain amount of covered emissions (t CO₂-e) per financial year. This number is the 'designated large facility threshold' under section 22XJ of the Act.
- 2.11 The designated large facility threshold is specified in the safeguard rule as 100,000 t CO₂-e in a financial year. *[section 8]*
- 2.12 The safeguard mechanism applies to 'persons' which enables coverage of a wide range of legal structures. A broad approach maximises the application of the safeguard mechanism across the economy, while supporting competitive neutrality by covering different legal structures in the same market.
- 2.13 The person or entity with operational control of a designated large facility, referred to in the Act, under paragraphs 22XE, 22XF and 22XH, as the 'responsible emitter', will be responsible for ensuring the facility's net emissions number does not exceed the facility's baseline emissions number for the given monitoring period (i.e. avoiding an excess emissions situation).
- 2.14 Placing obligations on the entity with operational control of the facility ensures that responsibility rests with the entity that is best placed to manage the facility's emissions and take action to reduce them, if needed.

Part 3

Baselines

Outline of the Part

- 3.1 This Part explains the baseline provisions set out in the safeguard rule.
- 3.2 Division 2 of this Part sets out the circumstances for making the different types of baseline determinations and how the baseline emissions number is calculated. Example scenarios illustrate how the provisions in this Part could apply to a facility (see the section headed *Example scenarios* on page 106 of the Explanatory Statement).

Division 1—Baseline emissions number

Sections 9 and 10: Operation of this Division, Baseline emissions number

- 3.3 The baseline emissions number is the reference point used to evaluate the emissions performance of a designated large facility. If at the end of a monitoring period a facility's net emissions exceeds its baseline emissions number, an excess emissions situation exists (see section 22XE of the Act). Where a monitoring period is longer than a year, the sum of the baseline emissions numbers applicable in each financial year constituting the monitoring period are used under section 22XE of the Act to compare with the net emissions number for the facility for that monitoring period.

For example, if a baseline emissions number is 100,000 t CO₂-e in both 2016-17 and 2017-18, a monitoring period from 1 July 2016 to 30 June 2018 would sum the baseline emissions numbers to 200,000 t CO₂-e and compare that with the net emissions number for the monitoring period. If covered emissions were 105,000 t CO₂-e in both 2016-17 and 2017-18 and 10,000 Australian Carbon Credit Units were surrendered for that period, the net emissions number would be 105,000+105,000-10,000= 200,000 t CO₂-e, which is the same as the baseline of 200,000 t CO₂-e. No excess emissions situation would exist for the monitoring period.
- 3.4 For subsection 22XL(1) of the Act, Divisions 1 and 2 of Part 3 of the safeguard rule sets out how to calculate the baseline emissions number. *[section 9]*
- 3.5 The baseline emissions number is expressed in t CO₂-e for a financial year. *[section 10]*
- 3.6 If a baseline determination is in force for a facility, the baseline emissions number is the number ascertained under that determination. *[paragraph 10(a)]* The number must be rounded up or down to the nearest whole number, with numbers ending in '.5' being rounded up.

- 3.7 If there is no baseline determination in force, then a facility's baseline emissions number is 100,000 t CO₂-e. *[paragraph 10(b)]* This is the same as the designated large facility threshold.
- 3.8 In an instance that a facility's monitoring period is shorter than a financial year, subsection 22XL(2) of the Act sets out that the baseline emissions number is calculated on a pro rata basis by:
- dividing the baseline emissions number by 365 days
 - multiplied by
 - the number of days in the monitoring period.

For example, on 30 January 2018 a manufacturing facility with a baseline emissions number of 210,000 t CO₂-e ceased operation and the responsible emitter no longer had operational control of the facility. The facility's monitoring period was therefore 214 days during 2017-18. The Regulator calculated the baseline emissions number for that monitoring period as 210,000 t CO₂-e divided by 365 days and multiplied by 214 days, equalling 123,123 t CO₂-e. The facility operator reported 110,000 t CO₂-e of covered emissions for the 214 day monitoring period. This was less than the baseline emissions number so there was no excess emissions situation.

Division 2—Baseline determinations

- 3.9 Baseline determinations contain the baseline emissions number for a designated large facility.

Subdivision 1: Preliminary

- 3.10 Division 2 of Part 3 of the safeguard rule provides for the making, varying and expiry of baseline determinations. *[section 11]*

Section 12: Minimum baseline emissions number

- 3.11 A baseline emissions number cannot be less than 100,000 t CO₂-e, which is the designated large facility threshold. *[section 12]*

Section 13: References to covered emissions

- 3.12 While Part 2 of the safeguard rule specifies the kinds of emissions covered under the safeguard mechanism, covered emissions have a particular meaning for the purpose of making a baseline determination. *[section 13]*
- 3.13 It is intended that the covered emissions for a facility from 1 July 2009 onwards are calculated in accordance with the safeguard rule for the purposes of making a baseline determination. This enables a baseline emissions number to be derived from the covered emissions emitted in a historic year.

Covered emissions for electricity generators

- 3.14 The covered emissions of an individual electricity generator that is a designated large facility will be considered covered emissions for the purposes of making a baseline determination if the financial year is not a sectoral-baseline financial year (see *Coverage of grid-connected electricity generators* section on page 34 of the Explanatory Statement). *[paragraph 13(a)]* This ensures that baseline determinations can be made and varied for grid-connected electricity generators in advance of the sectoral-baseline being exceeded.

Covered emissions for landfill facilities

- 3.15 Legacy emissions from the operation of a landfill facility are considered covered emissions for the purposes of making any baseline determination that is not a landfill-benchmark baseline determination (this type of baseline determination is set out in subdivision 7 of the safeguard rule). *[paragraph 13(b)]* For a reported-emissions baseline determination, this provision enables the baseline emissions number to be ascertained from the emissions of all waste accepted at the facility, not distinguishing legacy and non-legacy emissions.

For example, from 2009-10 to 2013-14 (the historical baseline period), a landfill operator reported its landfill facility's greenhouse gas emissions under the Act. Over that period the facility's emissions peaked in the year 2013-14 at 600,000 t CO₂-e, which became the facility's baseline emissions number. In 2016-17, the first year of the safeguard mechanism, the facility operator reported total greenhouse gas emissions of 700,000 t CO₂-e. However, the model used to estimate emissions showed that the new waste received by the facility in 2016-17 had not yet begun to generate emissions, and therefore covered emissions from 2016-17 were recorded as zero. The next financial year in 2017-18, the facility operator reported total emissions of 850,000 t CO₂-e, 150,000 of which were covered emissions attributed to waste received after 1 July 2016.

In 2016-17, the facility had no covered emissions so the landfill operator had no obligations under the safeguard mechanism in that year. In 2017-18, with emissions from waste deposited after 1 July 2016 reported as 150,000 t CO₂-e, the facility was covered by the safeguard mechanism.

Subdivision 2—Reported-emissions baseline determinations

- 3.16 A reported-emissions baseline determination has a baseline emissions number that is ascertained from the covered emissions emitted from a facility in a financial year between 2009-10 and 2013-14. *[subsections 14(1)]*
- 3.17 This type of baseline determination applies to existing facilities. A facility with a reported-emissions baseline determination would have emissions reported under the Act for at least one of the financial years from 2009-10 to 2013-14. A reported-emissions baseline determination is generally made by the Regulator with no need for the responsible emitter to make an application, and does not expire, meaning that it will continue to apply unless replaced by another baseline determination.

Section 14: Reported-emissions baseline determination

3.18 The Regulator must make a reported-emissions baseline determination for a facility in each of the following three circumstances:

- A facility operator reported its emissions under the Act in each of the five financial years from 2009-10 to 2013-14 and the covered emissions in one or more of these years were more than 100,000 t CO₂-e. The baseline emissions number for such a facility is the highest amount of covered emissions emitted in a financial year within this period (2009-10 to 2013-14). *[paragraph 14(1)(a) and subsection 17(1)]*

For example, a facility's covered emissions were 200,000 t CO₂-e in 2009-10 and 220,000, 210,000, 190,000 and 205,000 t CO₂-e in the following years. The baseline emissions number for the facility is the highest of these values, equalling 220,000 t CO₂-e.

- A facility operator reported its emissions under the Act in at least three of the five financial years from 2009-10 to 2013-14 and the covered emissions in all three of these years were more than 100,000 t CO₂-e. The baseline emissions number for such a facility is the highest amount of covered emissions emitted in a financial year within this period (2009-10 to 2013-14). *[paragraph 14(1)(b) and subsection 17(1)]*

For example, a facility's covered emissions were 80,000 t CO₂-e in 2010-11, 120,000 t CO₂-e in 2011-12, 140,000 t CO₂-e in 2012-13 and 130,000 t CO₂-e in 2013-14. The facility was not required to report its emissions under the Act in 2009-10. The baseline emissions number for the facility is the highest of these values, equalling 140,000 t CO₂-e.

- A facility operator reported its emissions under the Act in at least one of the five financial years from 2009-10 to 2013-14, the covered emissions in one of those was more than 100,000 t CO₂-e and the responsible emitter has notified the Regulator prior to 1 August 2016 that it wanted a reported-emissions baseline determination. The baseline emissions number for such a facility is the highest amount of covered emissions emitted in a financial year within this period (2009-10 to 2013-14). *[paragraph 14(1)(c) and subsection 17(1)]* This allows a facility to choose to use its high point in reported emissions even with few historic data points.

For example, a facility's covered emissions were 80,000 t CO₂-e in 2012-13 and 120,000 t CO₂-e in 2013-14. The facility was not required to report its emissions under the Act prior to 2012-13. The responsible emitter for the facility notified the Regulator in writing prior to August 2016 that it wants a reported-emissions baseline determination. The baseline emissions number for the facility is the highest of these values, equalling 120,000 t CO₂-e.

Global warming potential

- 3.19 When determining a facility's covered emissions in the financial years from 2009-10 to 2013-14, where possible the Regulator will use the global warming potential values specified under the NGER Regulations at the time when the determination is made. These values were updated from 1 July 2015. In particular, carbon dioxide, methane, nitrous oxide and perfluorocarbon emissions attributable to aluminium production will also use the current global warming potential values. Other global warming potential values are taken to be the value used in the report at the time it was submitted under the Act for the purpose of whether to make a reported-emissions baseline determination. *[paragraph 14(3)]* However, in setting the baseline emissions number the responsible emitter may provide information about other greenhouse gases to potentially enable the current global warming potential values to be used instead of those previously reported under the Act. *[subsection 17(6)]*

For example, if emissions from three different types of hydrofluorocarbon greenhouse gases were reported in tonnes of carbon dioxide equivalence in reports submitted under the Act in the financial years from 2009-10 to 2013-14, and the responsible emitter has not provided sufficient disaggregated emissions data from those three gases, then the global warming potential of those three gases is assumed to be what it was when reported.

Inter-state transport facilities

- 3.20 Inter-state transport facilities, which under the NGER Regulations are treated as separate state-based facilities, have the option of nominating to report its emissions as a national facility for the purposes of reporting and for managing its obligations under the safeguard mechanism. This option is possible under amendments to the NGER Regulations to be made by the *National Greenhouse and Energy Reporting Amendment (2015 Measures No.2) Regulation 2015* (refer to the Explanatory Statement for this regulation amendment for further information).
- 3.21 Where a nomination to this effect has been made under regulation 2.19A of the amended NGER Regulations, then the covered emissions for the national facility in the baseline period, the financial years from 2009-10 to 2013-14, will be determined as if the national facility definition had been in place during that period. *[subsection 14(2)]* Depending on if the covered emissions for the national facility is above 100,000 t CO₂-e, a reported-emissions baseline determination may be made in accordance with subsection 14(1) of the safeguard rule.
- 3.22 If under paragraph 14(1)(c), the making of the reported-emissions baseline determination requires the responsible emitter to notify the Regulator that it wants such a baseline determination, then this notification must be made by 1 August in the financial year that the national facility definition is to first apply to the transport facility. *[subparagraph 14(2)(b)(ii)]*
- 3.23 A reported-emissions baseline determination made for a national facility will commence at the start of the financial year that the national facility definition first applied to the transport facility, unless a calculated-emissions baseline determination has been made to commence at the same time. *[subsection 18(2)]*

- 3.24 The rules provide for calculated-emissions, benchmark-emissions or production-adjusted baseline determinations made in relation to state-based facilities to be incorporated into the reported-emissions baseline determination. *[subsection 17(5)]* This is done by aggregating together the baselines in force for any state based transport facility in place of historic data on the emissions performance of the facility. See the section headed *Section 20: Variation of transport reported-emissions baseline determination where calculated-emissions baseline determination or benchmark-emissions baseline determination incorporated* on page 46 of the Explanatory Statement for further information.

Section 15: Further information

- 3.25 The Regulator may require the responsible emitter to provide further information in connection with the making of the reported-emissions baseline determination. Such a request is made in writing and will specify a due date for the applicant to provide the required information. *[subsection 15(1)]*
- 3.26 The consequence of the responsible emitter not giving the Regulator the required information by the due date is that the Regulator may delay making the reported-emissions baseline determination until the information is provided. Alternatively, the Regulator may make assumptions about the information that was not provided. *[subsection 15(2)]*

Section 16: Process for making a reported-emissions baseline determination

- 3.27 The Regulator may make the determination if one of the circumstances in subsection 14(1) is met. Unlike other types of baseline determinations, the Regulator's decision is not based on an application from a responsible emitter.
- 3.28 Before making a reported-emissions baseline determination, the Regulator must notify the responsible emitter that it intends to make a determination and the proposed baseline emissions number. *[subsection 16(1)]*
- 3.29 The Regulator must seek any comments from the responsible emitter by a date specified in the written notice. *[paragraph 16(1)(d)]* The Regulator must then consider any comments received by the due date and use all reasonable endeavours to make the determination by the later of the following:
- 30 days after either the receipt of required information or the due date for comments
 - 1 September after the baseline is proposed to commence. *[subsection 16(2)]*
- 3.30 As soon as practicable after making the determination, the Regulator must notify the facility operator of the baseline emissions number and publish the details of the determination on its website. *[subsection 16(3)]* The type of details are listed in section 4 of the safeguard rule, and include the start date of the determination and the relevant facility.

- 3.31 It is intended that the Regulator may begin the work to make reported-emissions baseline determinations in anticipation of the commencement of the safeguard rule. Accordingly, the Regulator may begin the process for making a determination, including issuing written notice about this to responsible emitters, before the safeguard rule commences. *[subsection 16(4)]* The written notice may specify a due date for comments that is prior to the commencement of the safeguard rule, however the Regulator's decision to make the reported-emissions baseline determination can only be made after the rule commences.

Section 17: Determining the baseline emissions number

- 3.32 The baseline emissions number is generally the highest reported scope 1 emissions value in the financial years from 2009-10 to 2013-14. As well as updating global warming potential values, there are a number of potential adjustments that may be made to these emissions values to ensure that the baseline emissions number reflects the activities currently conducted at each facility.

Vertically integrated production processes

- 3.33 Before 2013, when the NGER Regulations were amended by the *National Greenhouse and Energy Reporting Amendment (Streamlining Reporting) Regulation 2013*, a responsible emitter may have had the option of reporting emissions from its facilities as emissions from a single vertically integrated production process.

For example, a steel manufacturer may have been an example of vertical integration if the operator of the steel mill also operated the mine the raw product was sourced from, the transport network used to transport raw material to the steel mill or to customers (for example: a rail network or truck fleet), or any intermediate processing plants or export facilities.

- 3.34 Reported-emissions baseline determinations are made for individual designated large facilities, not vertically integrated production processes. If a designated large facility's emissions were formerly reported as part of a vertically integrated production process, only emissions attributable to the operation of the facility are taken into account. *[subsection 17(2)]* The Regulator may disaggregate data previously provided as a vertically integrated production process to meet this requirement. The responsible emitter must be notified about this at the time it is notified about the Regulator's intention to make the reported-emissions baseline determination. *[subparagraph 16(1)(c)(i)]*

Correct attribution of emissions

- 3.35 To ensure that the Regulator makes a reported-emissions baseline determination appropriate to a facility's present circumstances, the Regulator may disregard or include covered emissions in the baseline emissions number if they are significant. Significant means that the emissions would exceed the baseline emissions number by more than five per cent. *[subsection 17(7)]*

- 3.36 The Regulator must disregard significant covered emissions if either:
- they are attributable to activities no longer being conducted at the facility, provided that activities of the same kind as these previous activities are also no long conducted and not likely to be conducted for at least three years, or
 - the emissions from these previous activities are now reported under the Act as part of another facility. *[subsection 17(3)]*

A change that warrants the Regulator to disregard significant covered emissions would therefore relate to a change in the scope or kind of activities conducted at a facility, rather than the scale of activities.

For example if the significant covered emissions relate to a decrease in production volumes or changes in the equipment conducting the same type of activity, then the significant covered emissions should not be disregarded when determining the baseline emissions number.

- 3.37 Similarly, the Regulator is to include significant covered emissions resulting from a change in the facility boundary or scope of activities, meaning that covered emissions from activities now undertaken at the facility had been previously reported as coming from another facility. That is, a change in facility boundary or scope of activities has occurred to include another—or part of another—facility. *[subsection 17(4)]* A change in facility boundary or scope of activities does not include the expansion of activities already undertaken at the facility.

An example of a boundary change is where a facility (Facility A) begins to produce electricity where it previously purchased electricity from a separate facility (Facility B). The scope 1 emissions associated with the electricity used at Facility A is required to be reported by the operator of Facility A *[paragraph 17(4)(b)]* and must have previously been reported as occurring at a separate facility (e.g. Facility B). *[paragraph 17(4)(c)]* The emissions must be covered emissions.

- 3.38 When disregarding or including significant covered emissions for a facility under section 17 of the safeguard rule, the Regulator may *[subsection 17(8)]*:
- take into account information provided by the responsible emitter and any audit reports associated with information
 - include or disregard emissions on a pro rata basis using information shown in one or more reports under the Act
 - make a decision to include or disregard emissions if an audit of the emissions was requested with regards to the facility's emissions information, and this audit report was not provided or did not meet the requirements notified in writing by the Regulator to the responsible emitter for the facility.
- 3.39 Although it is not a mandatory requirement for the responsible emitter to provide the audit report referred to above, failure of the Regulator to have access to such information may impact its decision to include or exclude emissions.

- 3.40 Please see the section headed *Global warming potential* on page 40 of the Explanatory Statement for an explanation of the provisions in subsection 17(6) of the safeguard rule.

Section 18: Duration of reported-emissions baseline determinations

- 3.41 Consistent with section 22XQ of the Act, a reported-emissions baseline determination made by the Regulator commences on 1 July 2016, unless a calculated-emissions baseline determination with the same start date is made *[subsection 18(1)]*.
- 3.42 A reported-emissions baseline determination ceases to be in force from the date that any other baseline determination applies. *[paragraph 18(3)(a)]* If this determination or a subsequent determination expires, then the reported-emissions baseline determination comes back into force. *[paragraph 18(3)(b)]*

For example, the Regulator makes a reported-emissions baseline determination for a facility that commences on 1 July 2016. The Regulator then makes a calculated-emissions baseline determination that commences on 1 July 2017. When the calculated-emissions baseline determination expires on 30 June 2020, the reported-emissions baseline determination recommences. It could then be replaced with a production-adjusted baseline determination or remain in force if a production-adjusted baseline determination is not made.

Section 19: Variation of reported-emissions baseline determination because of reporting error or changes in activities

- 3.43 To ensure that reported-emissions baseline determinations remain appropriate to facilities, the Regulator may vary the baseline emissions number for a facility if the reporting on which the baseline is based proves to have been inaccurate, or if there is a change in the facility's activities. *[subsection 19(1)]*
- 3.44 If the report submitted under the Act, from which the baseline is based is resubmitted after the reported-emissions baseline determination is made, the Regulator may vary the baseline emissions number. *[paragraph 19(1)(a)]* It is noted that the resubmission of a report is not at the discretion of the reporter.

For example, a facility has a baseline emissions number of 200,000 t CO₂-e based on the covered emissions reported for 2012-13. The report under the Act for 2012-13 was resubmitted, resulting in the covered emissions being revised down to 190,000 t CO₂-e. The Regulator may vary the baseline emissions number from 200,000 to 190,000 t CO₂-e, provided that the revised covered emissions reported in 2012-13 remains the high point in reported covered emissions from 2009-10 to 2013-14. If the covered emissions reported under the Act for the facility in 2013-14 were 195,000 t CO₂-e, which is now the high point in reported covered emissions, then the Regulator may instead vary the baseline emissions number from 200,000 to 195,000 t CO₂-e.

- 3.45 If the Regulator has reasonable evidence (for instance, evidence supporting a reasonable belief) to consider that the report submitted under the Act (which the baseline emissions number is derived from) is incorrect, then the Regulator may vary the baseline emissions number. *[paragraph 19(1)(b)]* This enables the Regulator to vary the facility's baseline emissions number to address a numerical error in the report.
- 3.46 If the report from which the baseline is set includes significant covered emissions from activities, termed ***original activities***, and these were not conducted at the facility, then the Regulator may vary the baseline emissions number. The Regulator will consider the activities to be no longer conducted if they are unlikely to be conducted for at least the next three years *[paragraph 19(1)(c)]* This provision is only enabled if the kind of activity has ceased, and has not for example been scaled down, and the kind of activity which ceased is not expected to begin again for at least a three year period.
- For example, if the baseline is based on the emissions reported under the Act in 2012-13, and the report included significant covered emissions from electricity generation that is no longer conducted at the facility, then the Regulator may vary the facility's baseline emissions number. Significant covered emissions are defined in subsection 17(7) of the safeguard rule.
- 3.47 Before the Regulator varies a baseline determination, it must notify the responsible emitter that it intends to vary the determination, setting out what the new baseline emissions number would be and seeking any comments by a date specified in the notice. *[subsection 19(2)]* This provision provides the responsible emitter with an opportunity to comment on the matters that caused the Regulator to seek to vary the baseline determination.
- 3.48 The Regulator must use all reasonable endeavors to vary the determination by the later of 30 days after the date specified in the notice or 30 days after further information requested to be provided to the Regulator is provided. *[subsection 19(3)]*
- 3.49 As soon as practicable after varying the determination, the Regulator must provide written notice of the variation to the responsible emitter and publish the details of the varied determination on its website. *[subsection 19(4)]* The type of details are listed in section 4 of the safeguard rule, and include the start and end date of the varied determination and the relevant facility.
- 3.50 A determination varied by the Regulator under section 19 takes effect at the beginning of the financial year in which the Regulator makes the decision to vary the determination. *[subsection 19(1)]*
- 3.51 If the Regulator makes, or considers making, a variation of a reported-emissions baseline determination because of a reporting error or changes in the facility's activities, the Regulator may require further information in relation to the variation from the facility operator. *[section 21]* The request must be in writing and specify a day by which the required information must be provided.

Section 20: Variation of transport reported-emissions baseline determination where calculated-emissions baseline determination or benchmark-emissions baseline determination incorporated

- 3.52 For a transport facility which has made a nomination to be defined as a national facility under new regulation 2.19A of the amended Regulations, any baseline adjustment process that is in progress at any of the state or territory based facilities, will be superseded in favour of the new national facility baseline. *[subsection 18(4)]*
- 3.53 Any previous baseline determinations will cease and a new reported-emissions baseline determination will be set based on the national facility definition. This is generally achieved by aggregating the covered emissions reported under the Act by each of the state and territory facilities covered by the national facility for the years 2009-10 to 2013-14 and identifying the high-point in these aggregated emissions *[subsections 14(1) and 14(2)]*. However, if any of the state or territory facilities are covered by a calculated-emissions, benchmark-emissions or production-adjusted baseline determinations, then the baseline emissions number from this determination is part of this aggregation calculation, not the facility's emissions reported under the Act for the years 2009-10 to 2013-14. *[subsection 17(5)]*
- 3.54 If a calculated-emissions or a benchmark-emissions baseline determination was used to make a baseline determination for a national facility, then following the time this baseline determination would have expired (had the national facility definition not applied), the baseline determination for the national facility may be varied by the Regulator. *[subsection 20(1)]* This is done by the Regulator replacing the baseline emissions number from the expired calculated-emissions or benchmark emissions baseline determination, which is part of the aggregated calculation for the baseline emissions number for the national definition facility, with either:
- The baseline emissions number had a production-adjusted baseline determination been made for the state or territory transport facility, assuming that the national facility definition had not applied. The responsible emitter must provide the Regulator with the information and audit report that is necessary to make a production-adjusted baseline determination, by 31 October after the expiry of the calculated-emissions or benchmark-emissions baseline determination.
 - The baseline emissions number for the state or territory transport facility had the calculated-emissions or benchmark-emissions baseline determination never been made. *[subsection 20(2)]*

For example, a transport entity consists of a New South Wales facility and a Queensland facility and wishes to move to a national facility definition. The New South Wales facility is covered by a calculated-emissions baseline determination (with a baseline emissions number of 110,000 t CO₂-e). A production-adjusted baseline determination is expected to commence 1 July 2019 after the expiry of this calculated-emissions baseline determination. The Queensland facility has a reported-emissions baseline determination of 120,000 t CO₂-e per year.

The interim baseline for the national facility is the addition of the baseline emissions numbers in place for the two facilities at the time the national facility definition commenced (i.e. 120,000 t CO₂-e + 110,000 t CO₂-e = 230,000 t CO₂-e).

Upon expiry of the NSW facility's calculated-emissions baseline determination, the responsible emitter provides the Regulator with the information and audit report need to make a production-adjusted baseline determination for the NSW facility, which would have had a baseline emissions number of 150,000 t CO₂-e. The baseline for the national facility is varied to be 120,000 t CO₂-e + 150,000 t CO₂-e = 270,000 t CO₂-e.

- 3.55 Before the Regulator varies a baseline determination, it must notify the responsible emitter that it intends to vary the determination, setting out what the new baseline emissions number would be and seeking any comments by a date specified in the notice. *[subsection 20(3)]* This provision provides the responsible emitter with an opportunity to comment on the matters that caused the Regulator to seek to vary the baseline determination.
- 3.56 The Regulator must use all reasonable endeavors to vary the determination by the later of 30 days after the date specified in the notice or 30 days after further information requested to be provided to the Regulator is provided. *[subsection 20(4)]*
- 3.57 As soon as practicable after varying the determination, the Regulator must provide written notice of the variation to the responsible emitter and publish the details of the varied determination on its website. *[subsection 20(5)]* The type of details are listed in section 4 of the safeguard rule, and include the start and end date of the determination and the relevant facility.
- 3.58 For entities which nominate to report on the basis of a national transport facility definition for which neither existing baselines, nor adequate historical data is available, a calculated-emissions baseline determination will be made for the entire national facility, in accordance with the new facility criteria (see the section headed *Section 23: New facility criteria* on page 48 of the Explanatory Statement).

Subdivision 3—Calculated-emissions baseline determination

- 3.59 Calculated-emissions baseline determinations are intended for facilities that do not have sufficient historical emissions data to make a reported-emissions baseline determination or for which historical emissions may be a poor indicator of future emissions, because either the facility has significantly expanded or is subject to the inherent emissions variability associated with the extraction of natural resources.
- 3.60 A calculated-emissions baseline determination is based on estimates of production at a facility. This means that the baseline determination is temporary and will expire at a time that actual production data should be available. Once it expires, a facility may be eligible to apply for a production-adjusted baseline determination (see the section headed *Subdivision 5—Production-adjusted baseline determination* on page 71 of the Explanatory Statement).

Section 22: Application

- 3.61 Facility operators may apply to the Regulator for a calculated-emissions baseline determination if their facility meets the new facility criteria, the significant expansion criteria, the inherent emissions variability criteria or the initial calculated baseline criteria. *[subsection 22(1)]*
- 3.62 Applications must be given in writing in a manner and form approved by the Regulator, and must specify the start date for the calculated-emissions baseline determination as 1 July of a particular year. *[paragraphs 22(2)(a) and (b)]* That is, the period to be covered by the calculated-emissions baseline determination for a facility is determined by the timing and content of the application rather than, for example, the year in which the facility's covered emissions exceeded 100,000 t CO₂-e.
- 3.63 Applications must include the information required by section 27 and include an audit report that complies with section 28. *[paragraphs 22(2)(c) and (d)]*
- 3.64 Generally, an application for a calculated-emissions baseline determination may be given to the Regulator in the period between one year before the start of the determination applied for and the 31 October after the end of the first year covered by the determination. *[subsection 22(3)]*
- For example, if the application is for a determination covering the period from 1 July 2018 to 30 June 2021, the application may be given to the Regulator between 1 July 2017 and 31 October 2019.
- 3.65 If the Regulator has refused to make a determination applied for in a properly made application, the Regulator may accept a new application no later than the 1 February after the 31 October deadline. *[subsection 22(5)]* This provision allows applicants to address the matters that caused the Regulator to refuse to make the determination applied for within the general application window.
- 3.66 The applicant may withdraw the application at any time before the Regulator has made the determination the subject of the application. *[subsection 22(4)]*

Section 23: New facility criteria

- 3.67 New facilities may apply for a calculated-emissions baseline determination where there is not sufficient historical data for the Regulator to make a reported-emissions baseline determination. Facilities that lack sufficient historical data are likely to be new facilities that are still ramping up production. During the ramp-up phase of these facilities, historical emissions data is a poor guide to future emissions.

- 3.68 To meet the criteria for a new facility, the facility must not meet the criteria for a reported-emissions baseline determination set out in subsections 14(1) and (2). *[subsection 23(2)]* This includes that a facility had submitted reports under the Act for at least one, but not all of the five financial years beginning 2009-10 (meeting the requirements in subparagraphs 14(1)(c)(i) and 4(1)(c)(ii)), but did not notify the Regulator that it wanted a reported-emissions baseline under subparagraph 4(1)(c)(iii). This provision ensures that facilities eligible for a reported-emissions baseline are given such a baseline, including those who wanted such a baseline under paragraph 14(1)(c) of the safeguard rule.
- 3.69 The facility must not have reported emissions in each of the five years from 1 July 2009. *[subsection 23(3)]* Facilities that did report in each of these years are likely to have completed their ramp-up phases and are not new. The 100,000 t CO₂-e baseline in paragraph 10(b) of the safeguard rule will apply to such a facility until they are eligible for another kind of baseline determination, such as a determination based on a significant expansion.
- 3.70 The facility must have emitted, or be reasonably expected to emit, more than 100,000 t CO₂-e of covered emissions in the first year of the proposed calculated-emissions baseline determination. *[subsection 23(4)]* This provision ensures that baseline determinations are only made for facilities if they are above the designated large facility threshold. Facilities must not deliberately increase or intend to increase their covered emissions reported or calculated under the Act for the purpose of meeting this criterion. *[subsections 23(5)]*
- For example, emissions reported under the Act are worked out in accordance with the NGER (Measurement) Determination, which often gives options for how to do this. A facility operator has traditionally estimated an emissions source at their facility using a method that requires direct measurement of emissions. In one year, they select to instead estimate this emissions source using a default factor that tends to conservatively over-estimate the emissions source. The reason the facility operator changed its reporting method was to increase the scope 1 emissions reported to qualify for a calculated-emissions baseline determination under the new facility criteria. If they had not changed the way emissions were calculated, then they would not have been eligible for such a baseline.
- 3.71 The facility must never have had a calculated-emissions baseline determination. *[subsection 23(6)]* If a facility has had a calculated-emissions baseline determination then it will no longer be new. This also ensures that calculated-emissions baseline determinations cannot overlap or be replaced by another calculated-emissions baseline determination during the term of the original determination.
- 3.72 A calculated-emissions baseline determination made for a new facility must commence on 1 July in 2016, 2017, 2018 or 2019. *[subsection 23(7)]* Benchmark-emissions baseline determinations will apply to new facilities that exceed the 100,000 t CO₂-e designated large facility threshold after 1 July 2020 (see the section headed *Section 33: New facility criteria* on page 62 of the Explanatory Statement).

Section 24: Significant expansion criteria

- 3.73 Facilities that meet the significant expansion criteria may apply to the Regulator for a calculated-emissions baseline determination. *[subsection 24(1)]* This is because emissions caused by significant expansions cannot have been taken into account when making a reported-emissions baseline determination for facilities.
- 3.74 The facility must have previously emitted more than 100,000 t CO₂-e or be reasonably expect to emit more than 100,000 t CO₂-e in a year covered by the calculated-emissions baseline determination. *[subsection 24(7)]* This provision ensures that a calculated-emissions baseline for a significant expansion is not made in advance of a facility being covered by the safeguard mechanism.
- 3.75 The facility must have exceeded its baseline or be reasonably expected to exceed its baseline in at least one year of the three-year period covered by the calculated-emissions baseline determination. *[subsection 24(8)]* This rule ensures that calculated-emissions baseline determinations are only available for facilities whose significant expansions cause them to exceed their baseline. If the facility does not exceed its baseline in spite of significantly expanding, there is no reason for a new baseline determination to be made.

For example, a facility with a baseline emissions number of 400,000 t CO₂-e may apply for a calculated-emissions baseline determination commencing on 1 July 2018 if its annual covered emissions are reasonably expected to exceed 400,000 t CO₂-e between 1 July 2018 and 30 June 2021.

- 3.76 The significant expansion must have occurred in a relevant expansion period. *[subsection 24(2)]* A relevant expansion period is a period of up to three-years that must end either:
- immediately before the three-year period to be covered by the calculated-emissions baseline determination, or
 - immediately before the end of the first year to be covered by the calculated-emissions baseline determination . *[paragraphs 24(5)(a) and (b)]*
 - This ensures that calculated-emissions baseline determinations are only available for facilities whose significant expansions cause them to exceed their baseline. If the baseline is exceeded years after the significant expansion occurs, it is unlikely that the significant expansion is the primary cause of the exceedance.

For example, a facility may apply for a calculated-emissions baseline determination covering the period from 1 July 2017 to 30 June 2020 on the basis of a significant expansion that occurred between 1 July 2015 and 30 June 2018. The application must be submitted after the significant expansion has been completed and before 31 October 2018.

3.77 The start of the relevant expansion period is defined so that the period is no longer than three years, is not before 1 July 2014 and overlaps at most with the last year that a calculated-emissions baseline applies. *[paragraphs 24(5)(c) and 24(5)(d)]* This is because, had the significant expansion started earlier in the period covered by the previous calculated-emissions baseline determination, emissions attributable to the expansion would have been at least partly captured by the facility's calculated-emissions baseline and the subsequent production-adjusted baseline determination (if applied for).

3.78 If the facility has a previous calculated-emissions baseline, then this cannot overlap with a calculated-emissions baseline made by meeting the significant expansion criteria. *[subsection 24(9)]*

For example, a facility could have two back to back calculated-emissions baseline determinations in these circumstances:

- the first calculated-emissions baseline could be made by meeting the new facility, significant expansion, inherent emissions variability or initial calculated baseline criteria
- the second calculated-emissions baseline following the first, could be made by meeting the significant expansion or inherent emissions variability criteria.

3.79 For other facilities, that have not had a previous calculated-emissions baseline determination, the relevant expansion period must begin on the later of 1 July 2014 or three years before the end of the relevant expansion period. *[paragraph 24(5)(d)]* This is because, had the significant expansion started earlier and the facility had a reported-emissions baseline determination, then the emissions attributable to it will be at least partly captured by the facility's reported-emissions baseline determination, which is based on the emissions reported under the Act from 2009-10 to 2013-14.

For example, if a responsible emitter has requested a calculated-emissions baseline starts on 1 July 2019 based on meeting the significant expansion facility, then the new equipment that makes up the significant expansion must have been installed in the relevant expansion period that is within either the period 1 July 2016 to 30 June 2019 or the period 1 July 2017 to 30 June 2020. However, if this facility had a previous calculated-emissions baseline that ended on 30 June 2019, then the relevant expansion period can only be 1 July 2019 to 30 June 2020.

3.80 The calculated-emissions baseline determination must commence on 1 July in 2016, 2017, 2018 or 2019. *[subsection 24(10)]* Baseline determinations that commence 1 July 2020 or later are benchmark-emissions baseline determinations (see page 63 of the Explanatory Statement).

3.81 For a landfill facility, a significant expansion is defined as a 20 per cent increase in the facility's licensed capacity which must have occurred within a relevant expansion produce. *[subsection 24(4)]* Licensed capacity is the metric because landfills do not produce products in the typical sense of other facility types .

- 3.82 For facilities other than landfill facilities, a significant expansion must involve the installation and use of new equipment at the facility. *[paragraph 24(2)(a)]* The equipment must be used to produce or process a production variable. A facility's production variables are identified in accordance with section 5 of the safeguard rule. The installation and use of the equipment must have occurred within a relevant expansion period.
- 3.83 For facilities other than landfill facilities, the installation of the equipment at the facility must result in either:
- the production of a new production variable that was not produced previously at the facility nor replaces a previous production variable *[subparagraph 24(2)(b)(ii)]* (if the new production variable is an input, then for the purpose of the significant expansion criteria it is considered to be “produced” as long as it produces the outputs of a facility *[paragraph 24(3)(b)]*), or
 - at least a 20 per cent increase of the maximum productive capacity of a production variable that is already produced at the facility. The 20 per cent increase must take into account the decommissioning of any equipment previously used to produce the production variable. It relates to comparing the effective maximum productive capacity equipment in place immediately before the installation with the effective maximum productive capacity in place after the installation and any decommissioning. *[subparagraph 24(2)(b)(i)]*
- 3.84 The production variable that is produced by the new plant or equipment must be significant to the operation of the facility. *[paragraph 24(2)(c)]* Whether a production variable is ‘significant’ is determined with regard to whether the production variable is the facility's primary production variable (defined in section 4 of the safeguard rule) *[subparagraph 24(2)(c)(i)]*, or if it is not the primary production variable, then whether the production variable contributes more than 20 per cent of the total revenue expected in the year in the emissions forecast period with the highest expected production of the primary production variable. *[subparagraph 24(2)(c)(ii)]* The calculation of expected revenue must be based on prices at the time of the application. *[subsection 24(6)]*
- For example, if the production variable produced by the new plant or equipment is zinc, but the primary production variable for the facility is silver, then zinc must account for at least 20 per cent of forecast revenue in the year of the three-year emissions forecast period with the highest forecast production of silver (even if this is not the year with the highest zinc production).
- 3.85 If the production variable is onsite electricity generation, then it is considered significant to the operation of the facility if the electricity generation is expected to supply over 30 per cent of the facility's electricity needs over the three-year forecast period. *[subparagraph 24(2)(c)(iii)]*

- 3.86 The installation of new equipment at a transport facility includes the acquisition of equipment to undertake the transport activity, such as planes, trucks or trains, which may not necessarily be new. The requirement is unlikely to be met by construction of new airport infrastructure, roads or rail tracks unassociated with additional transport capacity. *[paragraph 24(3)(a)]*
- 3.87 The production variables identified for meeting the significant expansion criteria do not have to necessarily match the production variables identified for the emissions intensity test or for determining the baseline emissions number for the period of the calculated-emissions baseline *[paragraph 24(3)(c)]*
- 3.88 The concept of a replacement product is intended to be interpreted broadly to include changed products which, in substance, replace an earlier product that was produced. This includes an output with a higher purity and different composition to an output previously produced at the facility. This focuses the provision on genuinely new production variables, rather than modifications to existing products.

Section 25: Inherent emissions variability criteria

- 3.89 Facilities that meet the inherent emissions variability criteria may apply to the Regulator for a calculated-emissions baseline determination. *[subsection 25(1)]* This is because historical emissions from facilities that meet the criteria may be a poor predictor of future emissions.
- 3.90 The facility must have of have had either a reported-emissions baseline determination or a calculated-emissions baseline determination. *[subsection 25(2)]* Facilities that do not have one of these baseline determinations may be able to apply for a calculated-emissions baseline determination if they satisfy the new facility criteria or the initial calculated baseline criteria (see the sections headed *Section 23: New facility criteria* on page 48 or the section headed *Section 25: Inherent emissions variability criteria* on page 53 of the Explanatory Statement).
- 3.91 The principal activity of the facility must be the extraction of a natural resource, or the facility must be a natural gas processing or liquefaction facility involved in the extraction of natural gas from a natural gas reserve. *[paragraph 25(3)(a)]* If a facility's principal activity is, for example, the processing of a natural resource, the facility does not meet the criteria. It is intended that the association of a natural gas processing or liquefaction facility with one or more natural gas reserves may be through a pipeline network which is not part of the natural gas processing or liquefaction facility.
- 3.92 The properties of the resource or natural gas reserve must have a direct effect on the emissions or emissions intensity of the facility. *[paragraph 25(3)(b)]* The properties can be a combination of different aspects, including grade, depth, distance from a processing plant, greenhouse gas content or other properties. *[subsection 25(10)]* This criterion is intended to include facilities whose emissions rise because extraction practices change in response to properties of the resource.

For example, the carbon dioxide content of a natural gas reserve may have a direct effect on a facility's emissions or the emissions from a coal mine may increase because of the additional energy required to mine deeper seams. The 'other similar properties' of a resource are intended to refer to properties similar to grade and depth. Accordingly, 'other similar properties' does not include 'properties' such as the market value or scarcity of the resource. However, distance from, for example, a transport terminal—a similar property to depth (distance from the surface)—is intended to be a relevant 'other property'.

- 3.93 The facility must have a limited cost-effective ability to control for the covered emissions related to the natural resource or natural gas reserve. *[paragraph 25(3)(c)]*
- 3.94 In the first year of the period to be covered by the proposed calculated-emissions baseline determination the facility must exceed, or be reasonably expected to exceed, the baseline that currently applies to the facility. *[subsection 25(4)]*
- 3.95 The natural resource grade, depth or other properties must be the primary reason for the facility exceeding its baseline. *[subsection 25(5)]* Other possible reasons for exceedance would not meet the inherent emissions variability criteria such as increases in production or the cessation of a mitigation activity such as methane flaring.
- 3.96 No more than one calculated-emissions baseline determination may have been already made for the facility. *[subsection 25(6)]* That is, a maximum of two calculated-emissions baseline determinations can be made for a facility.
- 3.97 A benchmark-emissions baseline must never have been made in relation to the facility. *[subsection 25(7)]* That is, a facility cannot opt out of a benchmark-emissions baseline determination, even if it applies for calculated-emissions baseline determination meeting the inherent emissions variability criteria after 1 July 2020.
- 3.98 The facility must not be a grid-connected electricity generator. *[subsection 25(8)]*. These facilities are treated separately under the safeguard mechanism (see the section headed *Section 7: Covered emissions* on page 33 of the Explanatory Statement).
- 3.99 The calculated-emissions baseline determination the subject of the application must commence on a 1 July of a year between 2016 and 2024. *[subsection 25(9)]*

Section 26: Initial calculated baseline criteria

- 3.100 Facilities that meet the initial calculated baseline criteria may apply to the Regulator for a calculated-emissions baseline determination. *[subsection 26(1)]* This is because historical emissions from facilities that meet the criteria may be a poor predictor of future emissions.
- 3.101 One criterion is for the facility to either have a reported-emissions baseline determination or to have submitted emissions reports under the Act for the five years starting on 1 July 2009. *[subsection 26(2)]*

- 3.102 An additional criterion is that the facility has exceeded or expects to exceed its baseline emissions number in 2016-17. *[subsection 26(3)]* Facilities must not deliberately increase or intend to increase their covered emissions for the purpose of meeting this criterion. This could be done by changing how emissions are reported or calculated or causing scope 1 emissions. *[subsection 26(4)]*
- 3.103 Grid-connected electricity generators are not eligible for a calculated-emissions baseline determination on the basis of meeting the initial calculated baseline criteria. *[subsection 26(5)]* This is because these generators are included under the sectoral approach. In addition, entities in control of multiple generators could exceed the baseline emissions number of some generators—and thereby satisfy the initial calculated baseline criteria—simply by shifting production to other generators.
- 3.104 Calculated-emissions baseline determinations for facilities that satisfy the initial calculated baseline criteria commence on 1 July 2016. *[subsection 26(6)]*

Section 27: Information required in applications

- 3.105 Applications for calculated-emissions baseline determinations must include the information specified in section 27. *[subsection 27(1)]*
- 3.106 The application must explain and include supporting evidence substantiating how the facility meets the relevant eligibility criteria. *[paragraph 27(1)(a)]*
- 3.107 The application must include an outline of the measures to reduce greenhouse gas emissions intensity at the facility. *[paragraph 27(1)(b)]*
- 3.108 Facilities must select the appropriate year in the period covered by the calculated-emissions baseline determination from which to set their baseline. Generally, this year will be the year with the highest production level. However, the years the applicant can choose from are limited by the timing of the application. The year must be selected in accordance with the following rules and the quantity of production variables estimated for that year:
- If the application is received by the Regulator before the first 31 July after the proposed commencement of the calculated-emissions baseline determination—the year is the financial year with the highest expected production of the primary production variable over the three period to be covered by the determination (or five years if it is a large new facility). *[subparagraph 27(1)(c)(i)]*
 - If the application is received by the Regulator before the second 31 July after the proposed commencement of the calculated-emissions baseline determination—the year is the financial year with the highest expected production of the primary production variable of the last two years to be covered by the determination (or last four years if it is a large new facility). *[subparagraph 27(1)(c)(ii)]*
 - If the application is received by the Regulator after the second 31 July after the proposed commencement of the calculated-emissions baseline determination—the last financial year of the three year period to be covered

by the determination (or last three years if it is a large new facility).
[subparagraph 27(1)(c)(iii)]

- 3.109 Requiring that the year for setting the baseline is in the future of submitting the applications means that the quantity and emissions intensity of production variables must be estimated (not sourced from historical records). The purpose of this provision is to prevent the risk that emissions and emission-intensity are deliberately increased in a year and that year then selected as the year to set the baseline. If it were possible to include historical data in the calculation, then a facility could increase its emissions intensity in a year, then apply for a calculated-emissions baseline covering that year, knowing that under the safeguard rule the baseline could not be lower than the emissions from that year.
- 3.110 A facility's production variables are identified in accordance with section 5 of the safeguard rule. The quantity of the production variable must be estimated on the basis that the variable will be measured at a time that is as close as possible to when the variable enters, or leaves, the production or processing process or landfill facility. This requirement does not apply to production variables that are service units. *[subsection 27(3)]*
- 3.111 A facility's primary production variable is the production variable that is most significant for the operation of the facility having primary regard to the share of revenue and covered emissions attributable to that production variable. If a facility has only one production variable, that production variable is the facility's primary production variable (see the definition of primary production variable in section 4 of the safeguard rule).
- 3.112 The application must set out the emissions intensity for each production variable at the facility in the year selected in accordance with paragraph 27(1)(c).
[paragraph 27(1)(d)] The emissions-intensity calculation criteria are set out in section 6.
- 3.113 The application must set out the expected covered emissions from the facility by multiplying—for each production variable—the amount each of the facility's production variables in the year selected in accordance with paragraph 27(1)(c) by the emissions intensity of that production variable and summing the results.
[paragraph 27(1)(e)]
- 3.114 The application must include copies of the most recent environmental impact assessments (if any) relating to activities at the facility that result in significant covered emissions. *[paragraph 27(1)(f)]*
- 3.115 The application must include any relevant earlier estimates of the information required by paragraphs 27(1)(c), (d) and (e). *[paragraph 27(1)(g)]* What is meant by **relevant earlier estimates** is defined in section 4. Essentially, the estimates should have been made by the applicant or someone associated with the applicant, and not estimates by a third party, unendorsed by the responsible emitter.

- 3.116 If the expected production, emissions or emissions intensity in the application are different from relevant earlier estimates, the application must explain why this is the case. *[paragraph 27(1)(h)]* The Regulator may only make the baseline determination if satisfied that the explanation is reasonable. *[paragraph 30(2)(d)]*
- 3.117 The application must include historical emissions and production data that supports the estimates made under paragraphs 27(1)(c) and (d). *[paragraph 27(1)(i)]* This requirement helps the Regulator assess the estimates of emissions and emissions intensity put forward in the application.
- 3.118 If the application relates to a significant expansion, and the facility is not a landfill facility, the application must include evidence of:
- the maximum productive capacity of the equipment used to produce a production variable before and after the significant expansion. *[paragraph 27(2)(a)]*
 - that the new production variable was not produced before the relevant expansion period and is not a replacement production variable. *[paragraph 27(2)(b)]*
- 3.119 If the application relates to a significant expansion and the facility is a landfill facility, the application must include evidence of the landfill's licensed capacity before and after the significant expansion. *[paragraph 27(2)(c)]*

Section 28: Audit reports

- 3.120 Each application for a calculated-emissions baseline determination must be accompanied by an audit report. *[subsection 28(1)]* This requirement is intended to provide confidence about the data, estimates and projections put forward in applications.
- 3.121 The audits must be undertaken by national greenhouse and energy auditors, meaning they are registered under the NGER Regulations, who have the experience and expertise to undertake audits in relation to greenhouse gas emissions. The team leader of the audit must be registered as a Category 2 auditor. *[paragraph 28(5)(b)]* A Category 2 auditor has experience leading greenhouse audits. In addition, the audits must be conducted in accordance with the relevant requirements for limited and reasonable assurance engagements under the *National Greenhouse and Energy Reporting (Audit) Determination 2009* *[paragraph 28(5)(a)]* and with the requirements of subsection 74(1) of the Act, which provides that the Minister may determine requirements to be met by national greenhouse and energy auditors. *[paragraph 28(5)(c)]*

Reasonable assurance matters

- 3.122 In relation to the matters listed in paragraphs 28(2)(a) and (b), the audit report must make one of the following conclusions:
- a reasonable assurance conclusion
 - a qualified reasonable assurance conclusion
 - an adverse conclusion

- a conclusion that the assurance provider is unable to form an opinion about the matter being audited. *[subsection 28(3)]*
- 3.123 The audit report must make a conclusion as to whether the new facility criteria, significant expansion criteria, inherent emissions variability criteria or initial calculated baseline criteria relied on by the applicant have been met in all material respects. *[paragraph 28(2)(a)]* The applicant is required to substantiate how the criteria have been met, so it is assumed that the auditor will have access to the applicant's explanation.
- 3.124 The audit report must contain a conclusion as to whether the application has met the application requirements. *[subparagraph 28(2)(b)(i)]*
- 3.125 The audit report must contain a conclusion as to whether the application has been presented fairly. *[subparagraph 28(2)(b)(ii)]* A fairly presented application is, among other things, comprehensive, does not withhold important information and presents data in a consistent and transparent manner.

Limited assurance matters

- 3.126 In relation to the estimates of quantities and emissions intensities of production variables, the audit report must make one of the following conclusions:
- a limited assurance conclusion
 - a qualified limited assurance conclusion
 - an adverse conclusion
 - a conclusion that the assurance provider is unable to form an opinion about the matter being audited. *[subsection 28(4)]*
- 3.127 In relation to these limited assurance matters, only a limited assurance conclusion can be made because the matters involve estimates and projections.
- 3.128 There are no restrictions around the matters the audit report must address. However, the report must have regard to whether the applicant's assumptions provide a reasonable basis for the estimates, whether the estimates are reasonable and whether the estimates are supported by any relevant historical data that is fairly stated. *[paragraph 28(2)(c)]*

Section 29: Further information

- 3.129 The Regulator may require the applicant to provide further information in connection with the application. *[subsection 29(1)]* For example, the Regulator may require an applicant to provide further information to support estimates of production in the period to be covered by the calculated-emissions baseline determination.
- 3.130 If the applicant does not comply with the Regulator's request for further information, the Regulator may refuse to consider the application or refuse to take any further action in relation to the application. *[subsection 29(2)]*

Section 30: Making of calculated-emissions baseline determination

3.131 The Regulator makes or refuses to make calculated-emissions baseline determinations based upon its assessment of the application, audit report and other relevant material. *[subsection 30(2)]* In this process it is not intended that the Regulator will adjust the baseline emissions number put forward in the application, but may essentially accept or reject the information in the application and baseline emissions number put forward by the responsible emitter. If rejected, the responsible emitter would then have the opportunity to resubmit a new application to address any issues identified by the Regulator (providing application timelines are met).

3.132 The baseline emissions number is the number calculated in the application under paragraph 27(1)(e). *[subsection 30(3)]* The baseline emissions number must be rounded up or down to the nearest whole number, with numbers ending in '.5' being rounded up. *[subsection 30(7)]*

For example, the production variables of a facility were estimated as 30,000 tonnes of ammonia and 40,000 tonnes of ammonium nitrate in 2017-18 with respective emissions intensities of 1.5 and 2 t CO₂-e per tonne of product. The baseline emissions number would be 30,000 t ammonia × 1.5 t CO₂-e per tonne of product + 40,000 t ammonium nitrate × 2 t CO₂-e per tonne of product = 125,000 t CO₂-e.

3.133 If an application has been made that meets the application requirements in section 22, the Regulator may make the calculated-emissions baseline determination applied for if satisfied that:

- the audit report accompanying the application contains the relevant reasonable and limited assurance conclusions required under section 28, *[paragraphs 30(2)(a) and (b)]*
- the new facility, inherent emissions variability, significant expansion or initial calculated baseline criteria have been met. *[paragraph 30(2)(c)]*

3.134 If previously published estimates of emissions or emissions intensity differ from estimates in the application, the Regulator must be satisfied that the applicant's explanation of the difference is reasonable before making a determination. *[paragraph 30(2)(d)]*

3.135 The Regulator must take all reasonable steps to make a decision on the application within 60 days of the application being made, unless the Regulator requested additional information in relation to the application, in which case the Regulator has until 60 days after the information is received. *[subsection 30(4)]*

3.136 If the Regulator refuses to make the calculated-emissions baseline determination applied for, the Regulator must notify the applicant of this decision in writing. *[subsection 30(6)]*

- 3.137 As soon as practicable after making a determination, the Regulator must notify the applicant of the determination, and publish details of the determination on its website. *[subsection 30(5)]* Determination details are defined in section 4 of the safeguard rule. The publication requirement promotes public transparency in relation to the safeguard mechanism. In addition, the Regulator must publish the details of the application provided under paragraphs 27(1)(b), which relates to the measures to reduce greenhouse gas emissions at the facility.

Section 31: Duration of calculated-emissions baseline determinations

- 3.138 Under subsection 22XQ(2) of the Act, a determination that increases a facility's baseline can apply from the start of the financial year before the financial year in which the determination is made. Accordingly, if a calculated-emissions baseline determination is made within two years of the start date requested in the application, then it commences on the 1 July requested in the application. *[subsection 31(1)]*

- 3.139 If a calculated-emissions baseline determination is made more than two years after the 1 July start date requested in the determination, then it commences on the first 1 July permitted by subsection 22XQ(2). *[subsection 31(2)]*

For example, if the application requests a 1 July 2017 start date, but the determination is not made until 30 August 2019, then the determination commences on 1 July 2018.

- 3.140 Normally, calculated-emissions baseline determinations expire three years after the start date requested in the application. *[paragraph 31(3)(b)]* However, if the facility is a large new facility, the determination expires five years after the start date requested in the application. *[paragraph 31(3)(a)]* A large new facility is a facility that meets the new facility criteria, has or is likely to emit more than two million t CO₂-e in one of the five years beginning from the determination's requested start date and is not a grid-connected electricity generator. Calculated-emissions baseline determinations last longer for large new facilities because they typically take longer to ramp up production.

- 3.141 Determinations end three or five years after the requested start date and not the actual start date of the determination. This is because applications do not contain production or emissions intensity for years beyond the three or five year period applied for. The three or five year period is not 'rolled forward'.

- 3.142 Facilities that meet the inherent emissions variability criteria may apply for calculated-emissions baseline determinations twice. If the two determinations overlap, the first determination expires as soon as the second determination commences. *[subsection 31(4)]*

- 3.143 If a determination is made for a facility that meets the new facility criteria, and the facility does not exceed the designated large facility threshold in any of the financial years before 1 July 2020, the determination expires on 1 July 2020. *[subsection 31(5)]*

For example, if a determination is made commencing on 1 July 2019, but the facility does not exceed the threshold in the 2019-20 financial year, the determination expires on 1 July 2020. This rule ensures that facilities that first

exceed the designated large facility threshold after 1 July 2020 receive benchmark-emissions baseline determinations.

Subdivision 4—Benchmark-emissions baselines determination

- 3.144 Benchmark-emissions baseline determinations commence no earlier than 1 July 2020 and are broadly for new facilities and significant expansions, which no longer have access to calculated-emissions baseline determinations
- 3.145 Similar to a calculated-emissions baseline determination, a benchmark-emissions baseline determination is based on estimates of production at a facility. This means that the baseline determination is temporary and will expire at a time that actual production data should be available to replace the estimates. Once the baseline expires, a facility may be eligible to apply for a production-adjusted baseline determination (see section headed *Subdivision 5—Production-adjusted baseline determination* on page 71 of the Explanatory Statement).
- 3.146 Unlike a calculated-emissions baseline, which is made using the responsible emitter's estimates of emissions intensities of production variables, a benchmark-emissions baseline determination is made using emissions intensities sourced from the the Benchmark Emissions-Intensity Index in Schedule 1.
- 3.147 Landfill facilities are not eligible for a benchmark-emissions baseline determination because their baseline determination is made in a separate way after 1 July 2020 (see the section headed *Landfill-benchmark baseline determination* on page 86 of the Explanatory Statement). *[subsection 32(1)]*

Section 32: Application

- 3.148 Application requirements are similar to a calculated-emissions baseline determination, but the key difference is that the identification of production variables and estimates of emissions intensities are taken from the Benchmark Emissions-Intensity Index in Schedule 1 and not identified or estimated by the applicant. This means that these applications focus on the quantity of production and applicability of the benchmarks in that index rather than the future emissions performance of the facility.
- 3.149 There must be at least one benchmark emissions intensity applicable to a facility for the responsible emitter to apply to the Regulator for a benchmark-emissions baseline determination. As well as this the facility must meet either the new facility criteria or the significant expansion criteria. *[subsection 32(1)]* The new facility criteria and significant expansion criteria are set out in sections 33 and 34 of the safeguard rule respectively and benchmark emissions intensities are listed in the Benchmark Emissions-Intensity Index in Schedule 1.
- 3.150 The application must be submitted in a form provided by the Regulator. It needs to specify the responsible emitter's requested start date of the benchmark-emissions baseline determination as 1 July of a particular year, on or after 2020. Other necessary information to include in the application is set out in section 35 and an audit report that complies with section 36 must also accompany the application. *[subsection 32(2) and subsection 33(6)]*

- 3.151 There are restrictions on when the application can be submitted that relate to the requested start date. The earliest it can be submitted is one year before the requested start date. The latest it can be submitted is the second 31 October after the requested start date, unless the Regulator has granted an extension under subsection 32(5). *[subsection 32(3)]*
- 3.152 The Regulator may extend the deadline for submitting the application to the second 1 February after the requested start date if all the following conditions are met:
- an application was submitted that met the requirements set out in subsections 32(2) and 32(3) *[paragraph 32(5)(a)]*
 - the Regulator refused to make the baseline determination requested in the application *[paragraph 32(5)(b)]*
 - a new application submitted following the Regulator's refusal would not meet the deadline set out in paragraph 32(3)(b). *[paragraph 32(5)(c)]*
- 3.153 This allows extra time for the submission of a subsequent application in the event that the previous application to have a baseline made was not successful, but had met the requirements for what to include in the application and was submitted on time.
- 3.154 A responsible emitter may withdraw an application at any time before the Regulator makes a decision on the application. This needs to be done by written notice to the Regulator. *[subsection 32(4)]*

Section 33: New facility criteria

- 3.155 This section sets out the criteria that a facility must meet to qualify for a benchmark-emissions baseline determination. *[section 33]* These criteria are based on demonstrating the facility is a new facility and are similar to the new facility criteria for calculated-emissions baseline determinations.
- 3.156 A new facility must not already be covered by a baseline determination. The one exception to this is if the baseline determination that covers the facility does not account for a new benchmark emissions intensity applicable to the facility, as set out in Schedule 1. *[subsections 33(2) and 33(7)]* In this situation, the facility may apply to have a baseline determination made meeting the new facility criteria, which would replace the existing baseline that no longer accounts for all the benchmark emissions intensities that are relevant to the facility.
- 3.157 A new facility will also not have an expired calculated-emissions baseline determination, unless the reason it expired was that the facility had not emitted more than 100,000 t CO₂-e of covered emissions in a financial year before 1 July 2020. *[subsection 33(5)]*
- 3.158 A new facility must have not been required to report its scope 1 emissions under the Act for five or more years before the requested start date of the baseline determination. *[subsection 33(3)]* Facilities that have been required to report under the Act for five or more years will have completed their ramp-up phases and are not new.

- 3.159 A new facility must have already emitted more than 100,000 t CO₂-e of covered emissions in a financial year or is reasonably expected to emit more than 100,000 t CO₂-e of covered emissions in the first year of the proposed benchmark-emissions baseline determination. *[subsection 33(4)]* This provision ensures that baseline determinations are only made for facilities if they are likely to be covered by the safeguard mechanism.
- 3.160 1 July 2020 is the earliest start date of a benchmark-emissions baseline determination that a responsible emitter of a new facility can request. *[subsection 33(6)]*

Section 34: Significant expansion criteria

- 3.161 This section of the safeguard rule sets out the criteria for demonstrating that a facility has undergone a significant expansion and therefore qualifies for a benchmark-emissions baseline determination (referred to as a significant expansion facility). *[section 34]* A facility's existing baseline emissions number may no longer be appropriate for a facility if it has undergone a significant expansion. The criteria are similar to the significant expansion criteria for calculated-emissions baseline determinations.
- 3.162 A significant expansion facility must have previously emitted more than 100,000 t CO₂-e of covered emissions or reasonably expect to emit more than this amount in a year covered by the benchmark-emissions baseline determination. *[subsection 34(6)]*
- 3.163 A significant expansion facility must have already exceeded its existing baseline emissions number or reasonably expect to exceed this baseline emissions number in at least one of the years that would be covered by the benchmark-emissions baseline determination. *[subsection 34(7)]*

For example, a facility with a baseline emissions number of 400,000 t CO₂-e may apply for a benchmark-emissions baseline determination starting on 1 July 2020 if its covered emissions are reasonably expected to exceed 400,000 t CO₂-e in a financial year between 1 July 2020 and 30 June 2023.

- 3.164 A significant expansion must have occurred within a time frame termed the relevant expansion period. This period ends immediately before either the requested start date of the benchmark-emissions baseline determination or before the end of the first year that the determination would apply. *[paragraphs 34(4)(a) and 34(4)(b)]* The length of the relevant expansion period may be up to three years, but will be shortened to avoid overlapping with more than one year of the period that a benchmark-emissions or calculated-emissions baseline determination applied to the facility. *[paragraphs 34(4)(c) and 34(4)(d)]* This is because, had the significant expansion started earlier, emissions attributable to it would have been at least partly captured by the facility's previous baseline determination.

For example, Facility A had a calculated-emissions baseline determination for the period from 2016-17 to 2018-19, which was then replaced with a production-adjusted baseline determination. It undertook a significant expansion in the year 2019-20. The significant expansion did not cause facility A's production-adjusted baseline to be exceeded in 2019-20, but the

responsible emitter had a reasonable expectation that it would be exceeded in 2020-21 and so applied for a benchmark-emissions baseline determination with a start date of 1 July 2020. The relevant expansion period for the application, ends on either 30 June 2020 or 30 June 2021 and must not start more than one year before the calculated-emissions baseline determination expired – 1 July 2018. The responsible emitter states the relevant expansion period is the financial years 2018-19 and 2019-20, which also meets the requirement of being three years or less.

- 3.165 A significant expansion must involve the installation and use of new equipment at the facility that produces or processes a production variable.
[paragraph 34(2)(a)] The production variable may be currently produced at the facility, prior to the significant expansion, or a new production variable not previously produced by the facility nor replacing a previous production variable.
[paragraph 34(2)(b)] If the new production variable is an input, then for the purpose of the significant expansion criteria it is considered to be “produced” as long as it produces the outputs of a facility. *[paragraph 34(3)(b)]* For this purpose, the production variables are as defined in the Benchmark Emissions-Intensity Index and not as determined by the responsible emitter.
- 3.166 If the installation of the new equipment at the facility is to increase the production of a production variable that is already produced at the facility, then it must result in a 20 per cent increase of the maximum productive capacity of this production variable. The 20 per cent increase in maximum productive capacity is measured after taking into account the decommissioning of any equipment previously used to produce the production variable. Accordingly, it relates to comparing the effective maximum productive capacity equipment in place immediately before the installation with the effective maximum productive capacity in place after the installation and any decommissioning.
[paragraph 34(2)(b)] This requirement does not apply if the result of the significant expansion is to begin production of a new production variable, which was not already produced at the facility.
- 3.167 The concept of a replacement product is intended to be interpreted broadly to include changed products which, in substance, replace an earlier product that was produced. This includes an output with a higher purity and different composition to an output previously produced at the facility. This focuses the provision on genuinely new production variables, rather than modifications to existing products.
- 3.168 The production variable that is produced by the new equipment must be significant to the operation of the facility *[paragraph 34(2)(c)]* There are three ways that a production variable can be considered significant:
- The production variable is the facility’s primary production variable (see definition in section 4 of the safeguard rule). *[subparagraph 34(2)(c)(i)]*
 - If the production variable is onsite electricity generation, then the amount forecasted to be supplied is more than 30 per cent of the facility’s forecasted electricity needs over the period that the benchmark-emissions baseline determination applies *[subparagraph 34(2)(c)(iii)]*

- If the production variable is not the primary production variable or on-site electricity generation, then it must contribute more than 20 per cent of the revenue expected from the facility. The year for assessing this is the year with the highest expected production of the primary production variable over the period to be covered by the benchmark-emissions baseline determination. *[subparagraph 34(2)(c)(ii)]* The calculation of expected revenue must be based on prices at the time of the application *[subsection 34(5)]*

For example, if the production variable produced by the new equipment is zinc and the facility's primary production variable is silver, then zinc should account for at least 20 per cent of the revenue forecasted in the year of the highest forecasted silver production in the period that the benchmark-emissions baseline determination applies.

- 3.169 The installation of new equipment at a transport facility means the acquisition of new or used equipment to undertake the transport activity, such as planes, trucks or trains, which may not necessarily be new. The requirement is unlikely to be met by construction of new airport infrastructure, roads or rail tracks unassociated with additional transport capacity. *[subsection 34(3)]*
- 3.170 1 July 2020 is the earliest start date of a benchmark-emissions baseline determination that a responsible emitter of a significant expansion facility can request. *[subsection 34(9)]*

Section 35: Information required in applications

- 3.171 Section 35 sets out the information that must be included in an application for a benchmark-emissions baseline determination. The information requirements are distinguished for those facilities applying under the new facility criteria (referred to a new facility application) *[subsection 35(1)]* or the significant expansion criteria (referred to as a significant expansion application). *[subsection 35(2)]*

New facility applications

- 3.172 The information required in a new facility application is:
- A statement with supporting evidence explaining how the facility has met the new facility criteria. *[paragraph 35(1)(a)]*
 - The quantity of all production variables that are likely to be produced by the facility in the financial year with the highest expected production level of the primary production variable over the period that will be covered by the determination. The units of these quantities and how the quantity is estimated must meet any relevant requirements of the Benchmark Emissions-Intensity Index that correspond to the production variable. *[paragraph 35(1)(b) and subsection 35(3)]*
 - The benchmark emissions intensities that correspond to each production variable identified in the application. These are sourced from the Benchmark Emissions-Intensity Index in Schedule 1. *[paragraph 35 (1)(c)]*
 - The expected covered emissions from the facility, which are calculated by multiplying the estimated quantity of each of the production variables identified in the application with the corresponding benchmark emissions

intensity and then summing the results if there is more than one production variable. *[paragraph 35(1)(d)]*

- Any relevant earlier estimates of the quantities of the identified production variables that have been made by the applicant or part of their business. It does not mean, for example, estimates made by parties unrelated to the applicant and not endorsed by the applicant. *[paragraph 35(1)(e)]* What is meant by **relevant earlier estimates** is defined in section 4 of the safeguard rule.
- If applicable, an explanation of why the quantity of production variables given in the application is different to relevant earlier estimates. *[paragraph 35(1)(f)]*

Significant expansion applications

3.173 The information required in a significant expansion application is:

- A statement explaining how the facility has met the significant expansion criteria, together with supporting evidence. *[paragraph 35(2)(a)]*
- The quantity of all production variables that are likely to be produced by the facility in the financial year with the highest expected production level of the primary production variable over the period that will be covered by the determination. The units of these quantities must match the metric used for the benchmark emissions intensity that corresponds to the production variable. *[paragraph 35(2)(b)]*
- The quantity of all production variables that are likely to be produced by the facility in the financial year with the highest expected production level of the primary production variable out of the three financial years before the financial year during which the new equipment began to be installed at the facility. The units of these quantities must match the metric used for the benchmark emissions intensity that corresponds to the production variable. *[paragraph 35(2)(c)]*
- The change in production for each production variable before and after the significant expansion. This is calculated by subtracting the quantity of each production variable identified under paragraph 35(2)(b) with the quantity of the production variable under paragraph 35(2)(c). It is possible that there is a negative change, meaning that the significant expansion is expected to decrease the level of production of a production variable. *[paragraph 35(2)(d)]*
- The benchmark emissions intensities that correspond to each production variable identified in the application. These are sourced from the Benchmark Emissions-Intensity Index in Schedule 1. *[paragraph 35(2)(e)]*
- The expected additional covered emissions from the facility by multiplying the change in production for each production variable under paragraph 34(2)(d) with the corresponding benchmark emissions intensity under paragraph 34(2)(e), and summing the results if there is more than one production variable. *[paragraph 35(2)(f)]*
- If the application states that the significant expansion increased the maximum productive capacity of an existing production variable by more than 20 per cent, then the application must include evidence of the

maximum productive capacity of equipment at the facility before and after the significant expansion. *[subparagraph 33(2)(b)(i), paragraph 35(2)(g)]*

- If a facility has a baseline set under subsection 10(b), meaning that it has no baseline determination, then the application must state the covered emissions of the facility in the financial year with the highest production level of the primary production variable out of the three financial years before new equipment began to be installed at the facility.
[paragraph 35(2)(h)]
- Any relevant earlier estimates of the quantities of the identified production variables that have been made by the applicant or part of their business. It does not mean, for example, estimates made by parties unrelated to the applicant and not endorsed by the applicant. *[paragraph 35(2)(i)]* What is meant by **relevant earlier estimates** is defined in section 4.
- If applicable, an explanation of why the quantity of production variable given in the application is different to relevant earlier estimates.
[paragraph 35(2)(j)]

3.174 The units used in the application for measuring and reporting quantities of production variables must be consistent with the relevant benchmark emissions intensity set out in the Benchmark Emissions-Intensity Index in Schedule 1.
[paragraphs 34(3)(a) and 35(3)(b)]

3.175 The period to be covered by the determination is relevant for estimating the quantity of production variables produced after the significant expansion. This is termed the *production estimation period* and is either three or five financial years beginning from the earliest 1 July possible that the benchmark-emissions baseline determination could commence. *[subsection 35(4)]* The production estimation period does not necessarily match the time that the benchmark-emissions baseline determination applied to a facility, because the determination may have started after the earliest possible date.

Audit reports

3.176 Each application for a benchmark-emissions baseline determination must be accompanied by an audit report. *[subsection 36(1)]* The matters to be audited are distinguished as reasonable assurance matters or limited assurance matters.
[subsection 36(2)]

3.177 A national greenhouse and energy auditor must do the audit, meaning that they are registered under the NGER Regulations. The team leader of the audit must in addition be registered as a Category 2 auditor. *[paragraph 36(5)(b)]* A Category 2 auditor has experience leading greenhouse audits. The audit must meet the relevant requirements for limited and reasonable assurance engagements under the *National Greenhouse and Energy Reporting (Audit) Determination 2009* *[paragraph 36(5)(a)]* as well as requirements of subsection 74(1) of the Act, which provides that the Minister may determine requirements to be met by national greenhouse and energy auditors.
[paragraph 36(5)(c)]

Reasonable assurance matters

- 3.178 In relation to reasonable assurance matters, explained below, the audit report must make one of the following conclusions:
- a reasonable assurance conclusion
 - a qualified reasonable assurance conclusion
 - an adverse conclusion
 - a conclusion that the assurance provider is unable to form an opinion about the matter being audited. *[subsection 36(3)]*
- 3.179 If the application has been made on the basis that the facility has undergone a significant expansion, then a reasonable assurance matter is whether the significant expansion criteria have been met in all material respects. *[paragraph 36(2)(a)]* The substantiation in the application that the criteria have been met and supporting evidence will be resources for the auditor.
- 3.180 Another reasonable assurance matter, applying to both new facility and significant expansion applications, is whether the application has met the application information requirements set out in section 35. *[subparagraph 36(2)(b)(i)]*
- 3.181 The final reasonable assurance matter is whether the application has been presented fairly. *[subparagraph 36(2)(b)(ii)]* A fairly presented application is, among other things, comprehensive, does not withhold important information and presents data in a consistent and transparent manner.

Limited assurance matters

- 3.182 In relation to the matters listed in paragraph 28(2)(c), the audit report must make one of the following conclusions:
- a limited assurance conclusion
 - a qualified limited assurance conclusion
 - an adverse conclusion
 - a conclusion that the assurance provider is unable to form an opinion about the matter being audited. *[subsection 28(4)]*
- 3.183 A limited assurance conclusion applies only to production estimates of the quantity of production variables. There are no restrictions around the matters the audit report addresses, but must include whether the applicant's assumptions are a reasonable basis for the estimates, and whether the estimates are supported by any relevant historical data. *[paragraph 36(2)(c)]*

Section 37: Further information

- 3.184 The Regulator may require the applicant to provide further information in connection with the application. Such a request is made in writing and will specify a due date for the applicant to provide the required information. *[subsection 37(1)]*

For example, the Regulator may require an applicant to provide further information to support estimated quantities of production given in the application.

- 3.185 The consequence of the applicant not complying with the Regulator's request for further information is that the Regulator may refuse to consider the application or refuse to take any further action in relation to the application. *[subsection 37(2)]* This does not prevent another application being submitted, provided they comply with the requirements set out in section 32.

Section 38: Making of benchmark-emissions baseline determination

Scope

- 3.186 The making of a benchmark-emissions baseline determination is in response to a new facility application or a significant expansion application submitted to the Regulator. *[subsection 38(1)]*

Determination

- 3.187 As with other baseline determinations, the Regulator may make a benchmark-emissions baseline determinations provided that is satisfied with a number of matters. *[subsection 38(2)]* These matters are:
- the audit report accompanying the application contains the relevant reasonable and limited assurance conclusions required under subsection 36(2) *[paragraphs 38(2)(a) and (b)]*
 - the relevant new facility or significant expansion criteria have been met *[paragraph 27(2)(c)]*
 - the production variables used in the application are applicable to the facility and quantities are measured in the units and way specified by the Benchmark Emissions-Intensity Index in Schedule 1 *[paragraph 38(2)(d)]*
 - if relevant, the applicant's explanation of the difference between previously published estimates of production with the estimates in the application. *[paragraph 36(2)(d)]*

Baseline emissions number

- 3.188 If the new facility criteria have been met in the application, then the baseline emissions number that is specified in the baseline determination is the tonnes of carbon dioxide equivalence calculated by multiplying the quantity of a production variable with its relevant benchmark emissions intensity and summing the results if there is more than one production variable. *[paragraph 38(3)(a)]*
- 3.189 If the significant expansion criteria have been met in the application, the baseline emissions number is the tonnes of carbon dioxide equivalence calculated by
- multiplying the quantity of change in production of a production variable with its relevant benchmark emissions intensity and summing the results if there is more than one production variable

- adding this value to either
- the baseline emissions number in a reported-emissions baseline determination or production-adjusted baseline determination that would otherwise apply in the first year of the benchmark-emissions baseline determination, or
- if a baseline emissions number applies because of paragraph 10(b)—the lesser of 100,000 t CO₂-e and the covered emissions of the facility in the financial year used in paragraph 35(2)(c). *[paragraph 38(3)(b)]*

For example, a facility producing ammonia and ammonium nitrate has a baseline emissions number of 150,000 t CO₂-e from a reported-emissions baseline determination. It qualifies for a significant expansion with the estimated change in the production of ammonia an additional 15,000 tonnes, and a decrease in production of ammonium nitrate by 5,000 tonnes. If the benchmarks were 1.5 t CO₂-e per tonne of ammonia and 2 t CO₂-e per tonne of ammonium nitrate, the baseline emissions number in the benchmark-emissions baseline determination would be (15,000 t ammonia × 1.5 t CO₂-e/t ammonia) + (-5,000 t ammonium nitrate × 2 t CO₂-e/t ammonium nitrate) + 150,000 t CO₂-e = 162,500 t CO₂-e

Timing

- 3.190 The Regulator will take all reasonable steps to make the determination within 60 days of receiving the application or if further information was required, then within 60 days of receiving the required information from the applicant. The 60 days is measured as calendar days. *[subsection 38(4)]*

Notification and publication

- 3.191 If the Regulator makes the benchmark-emissions baseline determination, then as soon as practicable the Regulator must notify the applicant in writing of the determination and publish details of the determination on its website. *[subsection 38(5)]* Determination details are defined in section 4 of the safeguard rule.
- 3.192 If the Regulator refuses to make the benchmark-emissions baseline determination applied for, then the Regulator must notify the applicant of this decision in writing. *[subsection 38(6)]*

Rounding

- 3.193 The baseline emissions number must be rounded up or down to the nearest whole number, with numbers ending in ‘.5’ being rounded up *[subsection 38(7)]*

Section 39: Duration of benchmark-emissions baseline determination

- 3.194 If a baseline determination is made within two years of the requested start date, then it must come into force on the requested start date. *[subsection 39(1)]* A determination can be made more than two years after the requested start date, however this determination would come into force from the earliest 1 July possible under subsection 22XQ(2) of the Act, rather than the requested start date. *[subsection 39(2)]*

- 3.195 A benchmark-emissions baseline determination expires at a time that actual production data should be available to replace the estimates that were given in the application. For a new facility this is either three or five years in the case of a large new facility, from the year that its covered emissions exceeded, or were expected to exceed, 100,000 t CO₂-e. For a significant expansion facility the benchmark-emissions baseline determination expires after three years.
[subsection 39(3)]

Subdivision 5—Production-adjusted baseline determination

- 3.196 Whereas a calculated-emissions or benchmark-emissions baseline determination is based on estimates of production at a facility, a production-adjusted baseline determination is based on actual, historical production data. The typical making of a production-adjusted baseline determination will be after the expiry of a calculated-emissions or benchmark-emissions baseline determination. The Regulator may only make this determination in response to the responsible emitter submitting an application.
- 3.197 Unlike a calculated-emissions or benchmark-emissions baseline determination, a production-adjusted baseline determination does not expire at a certain time. It will continue to cover a facility, unless it is replaced by a different baseline determination.

Section 40: Application

- 3.198 A responsible emitter for a facility may apply to the Regulator for a production-adjusted baseline determination if the facility meets one of two circumstances. *[subsection 40(1)]*. The first is following the expiry of a calculated-emissions baseline determination or benchmark-emissions baseline determination provided that the facility's covered emissions exceeded 100,000 t CO₂-e in one of the financial years that were covered by the determination and that there is no subsequent calculated-emissions or benchmark-emissions baseline determination covering the facility. *[paragraph 40(1)(a) and subsection 40(6)]* The second circumstance is that the facility meets or would have met at an earlier point in time, the new facility criteria for a benchmark emissions baseline determination, but the determination was never made. In this case, the requested start date of the production-adjusted baseline determination must be no earlier than the beginning of the third financial years after the facility's covered emissions first exceeded 100,000 t CO₂-e. *[paragraph 40(1)(b)]*

For example, a facility may have been unable to apply for a benchmark-emissions baseline determination because there was no benchmark emissions intensity listed in the Benchmark Emissions-Intensity Index that was relevant to the facility (this is an eligibility requirement set out in paragraph 32(1)(b) of the safeguard rule). A relevant benchmark has subsequently been added to the Index so that the facility could now apply for a benchmark-emissions baseline by meeting the new facility criteria. If the application would be made more than three financial years after the facility's covered emissions first exceeded 100,000 t CO₂-e, then actual production data should be known for the period that the benchmark-emissions baseline could have applied. This means that it is possible to make a production-adjusted baseline determination instead of a benchmark-emissions baseline determination, which would be based on estimated production levels.

- 3.199 The application must be submitted in a form provided by the Regulator. It needs to specify the responsible emitter's requested start date of the production-adjusted baseline determination as 1 July of a particular year. Other necessary information to include in the application is set out in section 41 and an audit report that complies with section 42 must also accompany the application. *[subsection 40(2)]*
- 3.200 Unless the Regulator has granted an extension under the provision given in subsection 32(5), then the latest the application can be submitted is by the second 31 October after the requested start date. The earliest it can be submitted is the requested start date. *[subsection 40(3)]*
- 3.201 A responsible emitter may choose to withdraw an application at any time before the Regulator makes a decision on the application. This needs to be done by written notice to the Regulator. *[subsection 40(4)]*
- 3.202 The Regulator may extend the deadline set out in subsection 40(3) to the second 1 February after the requested start date if all the following conditions are met:
- an application was submitted that met the requirements set out in subsections 40(2) and 40(3) *[paragraph 40(5)(a)]*
 - the Regulator refused to make the baseline determination requested in the application *[paragraph 40(5)(b)]*
 - a new application submitted following the Regulator's refusal would not meet the deadline set out in paragraph 40(3)(b). *[paragraph 40(5)(c)]*

Section 41: Information required in applications

- 3.203 The application for a production-adjusted baseline determination essentially updates the production estimates that were given in the application for the previous determination with actual production data. The information required in an application is distinguished for facilities whose previous baseline determination was made based on meeting the significant expansion criteria for a benchmark-emissions baseline determination and other applicants. This is because the significant expansion benchmark-emissions baseline determinations add the expanded production to an existing baseline, whereas other baseline determinations are calculated in relation to all of the production at a facility.
- 3.204 The application for facilities whose previous determination was not made based on meeting the significant expansion criteria for a benchmark-emissions baseline determination, must include:
- The quantity of the production variables produced in the financial year with the highest actual production level of the primary production variable over the production assessment period. This period is the same period for estimating production under the application for the previous baseline determination (termed the production estimation period, defined in section 5 of the safeguard rule). If there was no previous determination, then it means the year that the facility's covered emissions first exceeded 100,000 t CO₂-e and the two years following this year. *[subparagraph 41(1)(a)(i)]*

- If a facility's previous determination was a calculated-emissions baseline determination then the type of production variables put in the application must match those put in the application for this previous determination. The production quantities must be measured as close as possible to when the production variable enters, or leaves the production or processing process. *[subparagraph 41(1)(a)(ii) and paragraph 41(3)(a)]* Otherwise, the production variables are those relevant to the facility consistent with the Benchmark Emissions-Intensity Index in Schedule 1 and measured in accordance with any requirements set out in the schedule. *[subparagraph 41(1)(a)(iii) and paragraph 41(3)(b)]*
- The emissions intensities that correspond to each production variable identified in the application. If the previous baseline determination was a calculated-emissions baseline determination, then these must be the same as the emissions intensities set out in the application for that determination. *[subparagraph 41(1)(b)(i)]* Otherwise, these are sourced from the Benchmark Emissions-Intensity Index in Schedule 1. If there was a previous baseline determination, then these emissions intensities may be different to those set out in the application for that determination. *[subparagraph 41(1)(b)(ii)]*
- The production-adjusted total covered emissions from the facility, which is calculated by multiplying the production quantity of each of the production variables identified in the application with the corresponding emissions intensity and then summing the results if there is more than one production variable. *[paragraph 41(1)(c)]*

3.205 Applications where the previous baseline determination was made based on meeting the significant expansion criteria for a benchmark-emissions baseline determination must include:

- The quantity of all production variables that were produced by the facility in the financial year with the highest production level of the primary production variable over the period that was covered by the previous determination. The units of these quantities must match the metric used for the benchmark emissions intensity that corresponds to the production variable. *[paragraph 41(2)(a) and subsection 41(3)]*
- The change in production for each production variable before and after the significant expansion. This is calculated by subtracting the quantity of each production variable produced after the significant expansion, identified under paragraph 41(2)(b) with the quantity of the production variable produced prior to the significant expansion, identified under paragraph 35(2)(c). It is possible that there is a negative change, meaning that the significant expansion has decreased the level of production of a production variable. *[paragraph 41(2)(b)]*
- The benchmark emissions intensities that correspond to each production variable identified in the application. These are sourced from the Benchmark Emissions-Intensity Index in Schedule 1. *[paragraph 41(2)(c)]*
- The expected additional covered emissions from the facility by multiplying the change in production for each production variable under paragraph 40(2)(b) with the corresponding benchmark emissions intensity under

paragraph 40(2)(c) and summing the results if there is more than one production variable. *[paragraph 41(2)(d)]*

Section 42: Audit Reports

- 3.206 Each application for a production-adjusted baseline determination must be accompanied by an audit report. *[subsection 42(1)]* All matters to be audited are reasonable assurance matters, these are:
- Whether the application has met the application information requirements set out in section 41 and has been presented fairly. *[paragraph 42(2)(b)(i)]* A fairly presented application is, among other things, comprehensive, does not withhold important information and presents data in a consistent and transparent manner.
 - Whether the estimates of the quantity of each production variables meet the requirements of section 41(3) and are supported by historical data that is fairly stated. *[paragraph 42(2)(c)]*
 - In the case that production variables are required to be selected consistently with the Benchmark Emissions-Intensity Index, whether they are applicable to the facility and their selection is supported with historical data.
- 3.207 The audit report must make one of the following conclusions:
- a reasonable assurance conclusion
 - a qualified reasonable assurance conclusion
 - an adverse conclusion
 - a conclusion that the assurance provider is unable to form an opinion about the matter being audited. *[subsection 36(3)]*
- 3.208 The audit is conducted by a national greenhouse and energy auditor. The team leader of the audit must be registered as a Category 2 auditor under the NGER Regulations. *[paragraph 42(4)(b)]* A Category 2 auditor has experience leading greenhouse audits. The audit must meet the relevant requirements for limited and reasonable assurance engagements under the *National Greenhouse and Energy Reporting (Audit) Determination 2009* *[paragraph 42(4)(a)]* as well as requirements of subsection 74(1) of the Act, which provides that the Minister may determine requirements to be met by national greenhouse and energy auditors. *[paragraph 42 (4)(c)]*

Section 43: Further information

- 3.209 The Regulator may require the applicant to provide further information in connection with the application. Such a request is made in writing and will specify a due date for the applicant to provide the required information. *[subsection 43(1)]*

For example, the Regulator may require an applicant to provide further information to support the quantities of production variables given in the application.

- 3.210 The consequence of the applicant not complying with the Regulator's request for further information is that the Regulator may refuse to consider the application or refuse to take any further action in relation to the application. *[subsection 43(2)]* This does not prevent another application being submitted, provided they comply with the requirements set out in section 41.

Section 44: Making of production-adjusted baseline determination

Scope

- 3.211 The making of a production-adjusted baseline determination is in response to an application submitted to the Regulator. *[subsection 44(1)]*

Determination

- 3.212 As with the making of a calculated-emissions baseline determination and a benchmark-emissions baseline determination, the Regulator may make a production-adjusted baseline determination provided that it is satisfied with a number of matters. *[subsection 44(2)]* These matters are:
- the audit report accompanying the application contains a reasonable assurance conclusion or a qualified reasonable assurance conclusion *[paragraph 44(2)(a)]*
 - if relevant, the criteria specified in paragraph 40(1)(b) have been met, which relate to a facility that has not had a baseline determination previously but meets or met in the past the new facility criteria for a benchmark-emissions baseline determination *[paragraph 44(2)(b)]*
 - the production variables used in the application are consistent with the previous calculated-emissions baseline determination or otherwise relevant to the facility, and quantities are measured in the required units and way. *[paragraph 44(2)(c)]*

Baseline emissions number

- 3.213 If the application has been made following the expiry of a calculated-emissions baseline determination, then the baseline emissions number that is specified in the baseline determination is the tonnes of carbon dioxide equivalence calculated by multiplying the quantity of a production variable with the corresponding emissions intensity that was used for calculating the previous calculated-emissions baseline and summing the results if there is more than one production variable. *[paragraph 44(3)(a)]* The quantity of the production variables is determined for the financial year that had the highest production of the primary production variable over the production assessment period. *[subparagraph 41(1)(a)(i)]*

- 3.214 If the application is submitted following the expiry of a benchmark-emissions baseline determination that was made based on the facility meeting the new facility criteria, or there was no previous determination but the facility meets or would have met the new facility criteria, then the baseline emissions number that is specified in the baseline determination is the tonnes of carbon dioxide equivalence calculated by multiplying the quantity of a production variable with its relevant benchmark emissions intensity and summing the results if there is more than one production variable. *[paragraph 44(3)(b)]* The quantity of the production variables is determined for the financial year that had the highest production of the primary production variable over the production assessment period. *[subparagraph 41(1)(a)(i)]*
- 3.215 If the application is submitted following the expiry of a benchmark-emissions baseline determination that was made based on the facility meeting the significant expansion criteria, then the baseline emissions number is the tonnes of carbon dioxide equivalence calculated by:
- multiplying the quantity of change in production of a production variable with its relevant benchmark emissions intensity and summing the results if there is more than one production variable
 - summing this value to either
 - the baseline emissions number in a reported-emissions baseline determination or production-adjusted baseline determination that would otherwise apply in the first year of the benchmark-emissions baseline determination, or
 - if a baseline emissions number applies because of paragraph 10(b)—the lesser of 100,000 t CO₂-e and the covered emissions of the facility in the financial year used in paragraph 35(2)(c), *[paragraph 44(3)(c)]* which is from a financial year in the three years before the new equipment associated with the significant expansion is installed.

For example, a facility producing ammonia and ammonium nitrate has a baseline emissions number of 150,000 t CO₂-e from a reported-emissions baseline determination. It qualifies for a significant expansion benchmark-emissions baseline determination based on installing new plant and equipment that increases the maximum productive capacity of ammonia by more than 20 per cent. The *estimated* change in production resulting from the significant expansion was an increase in the production of ammonia by 15,000 tonnes and a decrease in the production of ammonium nitrate by 5,000 tonnes (with the benchmarks as 1.5 t CO₂-e per tonne of ammonia and 2 t CO₂-e per tonne of ammonia nitrate). The *actual* change in production turned out to be an additional 20,000 tonnes of ammonia and a decrease of 1,000 tonnes of ammonium nitrate during the period of the benchmark-emissions baseline determination. The baseline emissions number in the production-adjusted baseline determination would be (20,000 t ammonia × 1.5 t CO₂-e/t ammonia) + (-1,000 t ammonium nitrate × 2 t CO₂-e/t ammonium nitrate) + 150,000 t CO₂-e = 178,000 t CO₂-e.

- 3.216 It is generally expected that the Regulator will either accept the application and use the baseline emissions number provided in the application to make the determination or reject the application (with the potential for the responsible emitter to resubmit an application to address any calculation issues).

Timing

- 3.217 The Regulator will take all reasonable steps to make the determination within 60 days of receiving the application or if further information was required, then within 60 days of receiving the required information from the applicant. The 60 days are calendar days. *[subsection 44(4)]*

Notification and publication

- 3.218 If the Regulator makes the benchmark-emissions baseline determination, then as soon as practicable the Regulator must notify the applicant in writing of the determination and publish details of the determination on its website. *[subsection 44(5)]* What is meant by determination details is defined in section 4 of the safeguard rule.
- 3.219 If the Regulator refuses to make the benchmark-emissions baseline determination applied for, then the Regulator must notify the applicant of this decision in writing. *[subsection 44(6)]*

Rounding

- 3.220 The baseline emissions number must be rounded up or down to the nearest whole number, with numbers ending in ‘.5’ being rounded up *[subsection 44(7)]*

Section 45: Duration of production-adjusted baseline determination

- 3.221 If a baseline determination is made within two year of the requested start date, then comes into force on the requested start date. *[subsection 45(1)]* A determination can be made more than two years after the requested start date, however this determination would come into force from the earliest 1 July possible under subsection 22XQ(2) of the Act, rather than the requested start date. *[subsection 45(2)]*
- 3.222 A production-adjusted baseline determination expires only when another baseline determination comes into force for the facility. An expired production-adjusted baseline determination may also come back into force on the expiry of a calculated-emissions baseline determination or a benchmark-emissions baseline determination. If more than one production-adjusted baseline determinations have been made for a facility, then it is the most recent of these that would come back into force. *[subsection 45(3)]*

Subdivision 6—Variation of baseline determination for reduction in emissions intensity

Section 46: Application

- 3.223 Variations of baseline determinations for reductions in emissions intensity are intended for facilities whose emissions exceed their baseline because of increased production but whose emissions intensity has passed an emissions intensity test. For facilities that are benchmark facilities, meaning that their baseline determination was made using benchmark emissions intensities, the test is passed if they better the relevant benchmark emissions intensity. Other facilities pass the test by generally demonstrating that their emissions intensity has improved compared to historical performance.
- 3.224 If the relevant conditions are met, including passing the emissions intensity test, then the responsible emitter can apply to the Regulator for a temporary variation of their baseline emissions number. If varied, the baseline will be increased for one year to the actual level of the facility's covered emissions. After that year, the original baseline emissions number applies. The number of variation applications a facility can make is unlimited, which creates an incentive for facilities to continually lower the emissions intensity of their production.
- 3.225 The temporary variation covers the financial year in which the baseline was exceeded and is made by the Regulator in response to an application from the responsible emitter. *[subsection 46(1)]*
- 3.226 However, a facility cannot apply for both an emissions intensity baseline variation and a declared multi-year period that begins in the same year. *[paragraphs 46(2)(a) and 46(2)(b)]* Allowing facilities to apply for a baseline variation in the first year of a declared multi-year period would defeat the purpose of declared multi-year periods, which is to allow facilities to make good an excess emissions situation from one year in subsequent years. If there is no excess emissions situation because the baseline has been increased, there is no reason to have a declared multi-year period. There is no restriction on facilities applying for baseline variations in the second or third years of a declared multi-year period because those facilities will still need to make good an excess emissions situation from the first year of the declared multi-year period in the next year (i.e. the year after the temporary baseline increase).
- 3.227 This provision does not apply to landfill facilities with a landfill-benchmark baseline determination. *[paragraphs 46(2)(c)]* This is because the baseline emissions number for these facilities is already updated each year for the quantity of covered emissions (non-legacy waste emissions) generated.
- 3.228 Applications must be given in a manner and form approved by the Regulator, specify the financial year for which the application is made, include the information required by section 48 and include an audit report that complies with section 49 of the safeguard rule. *[subsection 46(3)]*

- 3.229 Applications should be made no later than the 31 October after the year to which the application relates, which gives the Regulator time to consider the application before the following 1 March (see section 22XF of the Act). *[subsection 46(4)]*

For example, an application relating to the 2017-18 financial year should be submitted by 31 October 2018.

- 3.230 If a valid application has been made but the Regulator has refused to vary the baseline as requested in the application, a second application in relation to the same financial year may be made no later than the 1 February following the 31 October deadline. *[subsection 46(6)]* This provision allows applicants to address the matters that caused the Regulator to refuse the first variation request.
- 3.231 An extension of the 31 October deadline to the following 1 February may also be granted by the Regulator, if the responsible emitter provides reasons why it was impractical to meet the 31 October deadline. *[subsection 46(7)]* Whether to allow the extension remains at the discretion of the Regulator.
- 3.232 The applicant may withdraw the application before the Regulator has made a decision in relation the application. *[subsection 46(5)]*

Section 47: Emissions intensity test

- 3.233 Facilities that request a baseline variation under section 46 of the safeguard rule must pass the emissions intensity test.

Emissions intensity test for facilities other than landfill or benchmark facilities

- 3.234 The emissions intensity test for facilities other than landfill or benchmark facilities, requires comparing the emissions intensity of production in the year for which the variation is sought with the emissions intensity of production in the baseline intensity comparison year.

Baseline intensity comparison year

- 3.235 A facility's baseline intensity comparison year (defined in section 4 of the safeguard rule) will depend on whether its baseline has previously been varied because it passed the emissions intensity test. If the facility has previously had its baseline varied as a result of passing the emissions intensity test, the baseline intensity comparison year is the year the baseline was last varied due to a reduction in emissions intensity. This rule encourages facilities to continually reduce the emissions intensity of production.
- 3.236 If the baseline has not been varied before because of passing the emissions intensity test, then the baseline intensity comparison year depends on what kind of baseline determination covers the facility:
- If the facility has a reported-emissions baseline, the baseline intensity comparison year is the financial year with the highest emissions in the period from 2009-10 to 2013-14 (see section headed *Section 14: Reported-emissions baseline determination* on page 39 of the Explanatory Statement).

- If the facility has a calculated-emissions baseline, the baseline intensity comparison year is deemed to be the first financial year of that determination. That year could be the same as the financial year for which the emissions intensity test is being applied. However, the estimated emissions intensity is used in the emissions intensity test rather than actual reported emissions intensity (see paragraph 3.108 on page 55 of the Explanatory Statement).
- If the facility has a production-adjusted baseline, the baseline intensity comparison year is the financial year used to determine the baseline emissions number for that baseline (see paragraph 3.204 on page 72 of the Explanatory Statement).

Emissions intensity test formula

- 3.237 Once a facility has identified its baseline intensity comparison year, it must identify its production variables in accordance with section 5 of the safeguard rule.
- 3.238 Where a facility has a single production variable present in both the baseline intensity comparison year and the year for which the variation is sought, the emissions intensities of the production variable in these two years is compared. If the emissions intensity is lower in the year for which the variation is sought, the facility passes the emissions intensity test. *[paragraph 47(1)(a)]*

For example, if the highest production year of a reported-emissions baseline determination (2013-14) had an emissions intensity of 2 t CO₂-e per tonne of synthetic rutile and in 2017-18 the emissions intensity decreased to 1.95 t CO₂-e per tonne of synthetic rutile, the emissions intensity test would be passed for 2017-18.

- 3.239 Where a facility has multiple production variables common to the baseline intensity comparison year and the year for which the variation is sought, the facility passes the emissions intensity test if the result of the following equation is positive *[paragraph 47(1)(b)]*:

$$\sum_p (EI_{b,p} - EI_{f,p}) \times Q_{f,p}$$

Where:

$EI_{b,p}$ is the emissions intensity of production variable p in the baseline intensity comparison year b

$EI_{f,p}$ is the emissions intensity of production variable p in the year for which the variation is sought f

$Q_{f,p}$ is the amount or volume of production variable p produced in the year for which the variation is sought f

- 3.240 The equation calculates the net difference in emissions between the baseline intensity comparison year and the year for which the variation is sought by comparing the emissions intensity of the common production variables. The result of the equation cannot be positive if the lower intensity production of one production variable is matched or exceeded by the higher intensity production of another production variable.

For example, the highest production year of a reported-emissions baseline determination (2013-14) had an emissions intensity of 2 t CO₂-e per tonne of synthetic rutile and 1.5 t CO₂-e per tonne of titanium dioxide. In 2017-18 the emissions intensity changed to 1.9 t CO₂-e per tonne of synthetic rutile and 1.6 t CO₂-e per tonne of titanium dioxide. If 50,000 tonnes of synthetic rutile and 10,000 tonnes titanium dioxide were produced in 2017-18, the equation for 2017-18 would be $((2 - 1.9) \times 50,000) + (1.5 - 1.6) \times 10,000 = 4,000$. As this number is positive, the emissions intensity test is satisfied for 2017-18.

- 3.241 The way that the emissions intensity test is performed for multiple production variables is preferable to comparing the average emissions intensity of the production variables across the two years, weighted for the number of production variables. This is because the weighted average emissions intensity can change as a result of production levels rather than any change in emissions intensity.

For example, the weighted average emissions intensity of three production variables decreases without the emissions intensity of any of the production variables changing when the quantity of the most emissions intense production variable decreases.

Benchmark facilities

- 3.242 In the emissions intensity test for benchmark facilities, the emissions intensity of production in the year for which the variation is sought is compared with the relevant benchmark emissions intensity.
- 3.243 Where a facility's benchmark-emissions baseline was made based on a single production variable, the facility passes the emissions intensity test if the emissions intensity in the year for which the variation is sought is lower than the relevant benchmark emissions intensity. *[paragraph 47(2)(a)]*

- 3.244 Where a facility's benchmark-emissions baseline was made based upon more than one production variables, the facility passes the emissions intensity test if the result of the following equation is positive *[paragraph 47(2)(b)]*:

$$\sum_p (EI_{r,p} - EI_{f,p}) \times Q_{f,p}$$

Where:

$EI_{r,p}$ is the relevant benchmark emissions intensity r of production variable p

$EI_{f,p}$ is the emissions intensity of production variable p in the year for which the variation is sought f

$Q_{f,p}$ is the amount or volume of production variable p produced in the year for which the variation is sought, measured in accordance with the requirements for the production variable set out in Schedule 1 *[subparagraph 47(4)(b)(iv)]*

- 3.245 The equation calculates the net difference in emissions between the year for which the variation is sought and the emissions if the facilities production in this year met the relevant benchmark emissions-intensities. The result of the equation cannot be positive if the lower intensity production of one production variable is matched or exceeded by the higher intensity production of another production variable.

Calculating the emissions intensity of a production variable

- 3.246 Unless the exception described in paragraph 3.249 of the Explanatory Statement applies, if there is only one production variable, then the emissions intensity is calculated by dividing the covered emissions for a facility by the quantity of the production variable produced in a financial year—either the baseline intensity comparison year or the year for which the variation is sought. *[subparagraph 47(4)(b)(ii)]* As the emissions intensity needs to be in t CO₂-e, this may require adjustment of historical emissions such that they use the same global warming potentials as apply to the year the subject of the application.
- 3.247 Unless the exception described in paragraph 3.249 of the Explanatory Statement applies, if there are two or more production variables, the covered emissions from the facility must first be apportioned between the production variables. Then the emissions attributed to each production variable are divided by the quantity of that production variable. Emissions must be apportioned consistently with the emissions-intensity calculation criteria (see the section headed *Section 6: Emissions-intensity calculation criteria* on page 29 of the Explanatory Statement). *[subparagraph 47(4)(b)(iii)]*
- 3.248 For facilities that are not benchmark or landfill facilities, the emissions must be apportioned the same way in the baseline intensity comparison year, the year for which the variation is sought and any previous application for a baseline variation because of a reduction in emissions intensity, provided that the application was based on the same production variables. *[subparagraph 47(4)(b)(v)]* This means that emissions intensity can be accurately compared.

- 3.249 If the baseline intensity comparison year is the first year of a calculated-emissions baseline determination, then the emissions intensity of production variables used in the emissions intensity test must be consistent with the emissions intensity of those production variables used to make the calculated-emissions baseline determination. *[paragraph 47(4)(a)]* This rule reflects that during the period of a calculated-emissions baseline determination the estimate of emissions intensity used in that determination is likely to be a better benchmark than past emissions intensity.

Landfill facilities

- 3.250 Landfill facilities that are not covered by a landfill-benchmark baseline determination, pass the emissions intensity test if the capture of covered emissions as a proportion of covered emissions generated in the year for which the variation is sought is higher than in the baseline intensity comparison year. *[subsection 47(3)]* This approach to landfill facilities has been taken because emissions from landfill facilities continue to increase over time, even if the amount of waste deposited does not change. The test for landfill facilities encourages them to minimise covered emissions by increasing the amount of landfill gas captured.

Section 48: Information to accompany applications

Facilities other than benchmark or landfill facilities

- 3.251 The application must set out the amount or volume of all the facility's production variables in the baseline intensity comparison year and the year the subject of the application. *[paragraph 48(1)(a)]*
- 3.252 If there are two or more production variables, the application must also set out the emissions intensity of each production variable. *[subparagraph 48(1)(b)(i)]*
- 3.253 If there are two or more production variables, the application must also set out the total covered emissions in the financial year for which the variation is sought by multiplying the emissions intensity of each production variable in the financial year by the quantity of the production variable then summing the results. *[subparagraph 48(1)(b)(ii)]*
- 3.254 The application must include an explanation of the method used to calculate the emissions intensity of each production variable and to apportion the facility's emissions between those production variable. *[paragraph 48(1)(c)]* This requirement helps the Regulator determine whether emissions intensity has been calculated, and emissions apportioned, consistently between years.
- 3.255 The quantity of a production variable must be measured at a time that is as close as possible to when the variable enters or leaves the production or processing process. *[subsection 48(2)]* This provision ensures that the quantity of a production variable may not have increased or decreased for reasons that have nothing to do with the volume of production or emissions.

Benchmark facilities

- 3.256 The application must set out the quantity of the facility's production variables in the year for which the variation is sought, measured in accordance with the relevant requirement in Schedule 1. *[paragraph 48(3)(a)]*
- 3.257 If there are two or more production variables, the application must also set out:
- the emissions intensity of each production variable. *[subparagraph 48(3)(b)(i)]*
 - the total covered emissions in the financial year for which the variation is sought by multiplying the emissions intensity of each production variable in the financial year by the volume or amount of production valuable then summing the results. *[subparagraph 48(3)(b)(ii)]*
- 3.258 The application must include an explanation of the method used to calculate the emissions intensity of each production variable and to apportion the facility's emissions between those production variable. *[paragraph 48(3)(c)]* This requirement helps the Regulator determine whether emissions intensity has been calculated, and emissions apportioned, consistently with the requirements set out in subsection 47(4) of the safeguard rule.

Landfill facilities

- 3.259 An application in relation to a landfill facility must include information about the amount of landfill gas captured at the facility in the baseline intensity comparison year and the year for which the variation is sought. *[paragraph 48(4)(a)]*
- 3.260 The application must also state the amount of scope 1 emissions from the landfill facility. This amount must not include landfill gas captured by the facility. *[paragraph 48(4)(b)]*

Section 49: Audit reports

- 3.261 An application for a variation of a baseline determination for a reduction in emissions intensity must be accompanied by an audit report that meets the requirements in section 49. *[subsection 49(1)]*
- 3.262 The audits must be undertaken by national greenhouse and energy auditors, who have the experience and expertise to undertake audits in relation to greenhouse gas emissions. The team leader of the audit must be registered as a Category 2 auditor under the NGER Regulations. *[paragraph 49(5)(b)]* A Category 2 auditor has experience leading greenhouse audits. In addition, the audits must be conducted in accordance with the relevant requirements for reasonable assurance engagements under the *National Greenhouse and Energy Reporting (Audit) Determination 2009* *[paragraph 49(5)(a)]* and with the requirements of subsection 74(1) of the Act, which provides that the Minister may determine requirements to be met by national greenhouse and energy auditors. *[paragraph 49(5)(c)]*
- 3.263 The audit report must make one of the following conclusions:
- a reasonable assurance conclusion

- a qualified reasonable assurance conclusion
- an adverse conclusion
- a conclusion that the assurance provider is unable to form an opinion about the matter being audited. *[subsection 49(4)]*

Facilities other than benchmark of landfill facilities

3.264 The audit report must cover whether, in all material respects:

- the emissions intensity test has been satisfied
- the application has been prepared in accordance with section 48 of the safeguard rule
- the application has been presented fairly
- the estimates of the quantity of each production variable meet the requirements of subsection 48(2) of the safeguard rule
- the estimates of the quantity of each production variable are supported by historical data that is fairly presented
- the calculation of the emissions intensity of each production variable meets the requirements of subsection 47(4) of the safeguard rule
- the calculation of the emissions intensity of each production variable is supported by historical data that is fairly stated. *[subsection 49(2)]*

Landfill facilities

3.265 The audit report must cover whether, in all material respects:

- the emissions intensity test has been satisfied
- the information included under subsection 48(4) of the safeguard rule is correctly stated, and
- the information included under subsection 48(4) of the safeguard rule is supported by historical data that is fairly stated. *[subsection 49(3)]*

Section 50: Further information

3.266 The Regulator may require the applicant to provide further information in connection with the application. *[subsection 50(1)]* For example, the Regulator may require an applicant to provide further information to support the calculation of emissions intensity.

3.267 If the applicant does not comply with the Regulator's request for further information, the Regulator may refuse to consider the application or refuse to take any further action in relation to the application. *[subsection 50(2)]*

Section 51: Variation of baseline determination

3.268 Similar to other baseline determinations, the Regulator may vary the baseline determination for a facility if satisfied that:

- the audit report accompanying the application contains a reasonable assurance or qualified reasonable assurance conclusion *[paragraph 51(2)(a)]*
 - the facility has passed the emissions intensity test *[paragraph 51(2)(b)]*
 - production variables have been identified, and the amount and emissions intensity of each production variable has been calculated, consistently between years for which information is provided in the application (this requirement does not apply to landfill facilities) *[paragraph 51(2)(c)]*
 - if there are two or more production variables, emissions have been apportioned consistently between years for which information is provided in the application (this requirement does not apply to landfill facilities). *[paragraph 51(2)(d)]*
- 3.269 If the Regulator varies a baseline determination, the varied baseline emissions number must be rounded to the nearest whole number, with numbers ending in ‘.5’ being rounded up. *[subsection 51(3)]*
- 3.270 The Regulator must take all reasonable steps to make a decision on the application within 60 days of the application being made, unless the Regulator requested additional information in relation to the application, in which case the Regulator has until 60 days after the information is received. *[subsection 51(4)]*
- 3.271 As soon as practicable after varying a baseline, the Regulator must notify the applicant of the variation, and publish details of the varied determination on its website. *[subsection 51(5)]* The type of details to be published are listed in section 4 of the safeguard rule.
- 3.272 If the Regulator refuses to vary a baseline, the Regulator must notify the applicant of this decision in writing. *[subsection 51(6)]*
- 3.273 Decisions to vary or refuse to vary baseline determinations under section 51 are reviewable decisions under section 56 of the Act, which provides which decisions made under the Act are reviewable by the Administrative Appeals Tribunal. *[subsection 51(7)]*

Subdivision 7—Landfill-benchmark baseline determination

Section 52: Application

- 3.274 The responsible emitter for a landfill facility is not able to apply for a benchmark-emissions baseline determination but may instead apply to the Regulator for a landfill-benchmark baseline determination. The only condition for applying is that the landfill facility has already emitted more than 100,000 t CO₂-e of covered emissions in a financial year, or reasonably expects to emit more than 100,000 t CO₂-e of covered emissions in the first year of the proposed landfill-benchmark baseline determination. *[subsection 52(1)]* Landfill facilities may apply for a landfill-benchmark baseline determination to replace an existing baseline determination. *[subsection 55(3)]*

- 3.275 The application must be submitted in a form provided by the Regulator. The information needed in the application is the responsible emitter's requested start date of the landfill-benchmark baseline determination and information establishing that the facility is a landfill facility. The requested start date must be 1 July of a particular year on or after 1 July 2020. *[subsection 52(2)]* An audit report does not accompany the application.
- 3.276 The latest the application may be submitted is the second 31 October after the requested start date. *[subsection 52(3)]*

Section 53: Further information

- 3.277 The Regulator may require the applicant to provide further information in connection with the application. Such a request is made in writing and will specify a due date for providing the required information. *[subsection 53(1)]*

For example, the Regulator may require an applicant to provide further information to support the reasonable expectation that the facility will emit more than 100,000 t CO₂-e of covered emissions in the first year of the proposed landfill-benchmark baseline determination.

- 3.278 The consequence of the applicant not complying with the Regulator's request for further information is that the Regulator may refuse to consider the application or refuse to take any further action in relation to the application. *[subsection 53(2)]* This does not prevent another application being submitted, provided the application complies with the requirements set out in section 52 of the safeguard rule.

Section 54: Making of landfill-benchmark baseline determination

Scope

- 3.279 The Regulator may make a landfill-benchmark baseline determination in response to an application made under section 52 of the safeguard rule. *[subsection 54(1)]*

Determination

- 3.280 The Regulator needs to be satisfied that the information in the application is correct, before making a landfill-benchmark baseline determination. Specifically, the facility that is the subject of the application needs to be a landfill facility and have already exceeded the designated large facility threshold, or have a reasonable expectation of exceeding this threshold in the first year that the baseline determination would apply. *[subsection 54(2)]*
- 3.281 Rather than being a baseline emissions number, a landfill-benchmark baseline determination is a formula. The formula calculates the baseline emissions number applicable to a landfill facility in a particular financial year. This means that baseline emissions number is recalculated using the formula for each year that the facility is covered by the baseline determination.
- 3.282 The formula calculates the baseline emissions number for the financial year *t* as follows:

- The amount of non-legacy greenhouse gas emissions in t CO₂-e emitted by the facility as included in a report under the Act for the financial year t. The amount disregards any capture of those emissions at the facility (such as in a pipe).
multiplied by
- One minus the benchmark capture efficiency rate for non-legacy greenhouse gas emissions as set out in the Benchmark Emissions-Intensity Index in Schedule 1 in force at the start of the financial year t. The benchmark capture efficiency represents the proportion of landfill gas that is captured and destroyed, so this number is subtracted from one to calculate the amount of covered emissions that does not need to be captured under the benchmark.
multiplied by
- One minus the oxidation factor in the near surface conditions of the landfill in subsection 5.4(1) of the NGER (Measurement) Determination in force at the start of the financial year t. This factor represents the proportion of landfill gas that passes through the surface of the landfill and is oxidised by microbial bacteria. This number is subtracted from one to calculate the amount of non-legacy greenhouse gas emissions that is emitted after taking into account this microbial oxidation effect. *[subsection 54(3)]*

Timing

- 3.283 The Regulator will take all reasonable steps to make the determination within 60 days of receiving the application or if further information was required, then within 60 days of receiving the required information from the applicant. The 60 days is measured as calendar days. *[subsection 54(4)]*

Notification

- 3.284 If the Regulator makes a landfill-benchmark baseline determination, then as soon as practicable the Regulator must notify the applicant in writing of the determination and publish details of the determination on its website. *[subsection 44(5)]* The baseline emissions number calculated each year under the baseline determination must also be published. *[subparagraph 69(1)(a)(iii)]*
- 3.285 If the Regulator refuses to make a landfill-benchmark baseline determination, then the Regulator must notify the applicant of this decision in writing. *[subsection 54(6)]*

Rounding

- 3.286 The baseline emissions number must be rounded up or down to the nearest whole number, with numbers ending in '.5' being rounded up *[subsection 54(7)]*

Section 55: Duration of landfill-benchmark baseline determination

- 3.287 If a baseline determination is made within two year of the requested start date, then it commences on the requested start date. *[subsection 55(1)]* A determination can be made more than two years after the requested start date, however this determination would come into force from the earliest 1 July possible under subsection 22XQ(2) of the Act, rather than the requested start date. *[subsection 55(2)]*
- 3.288 A landfill-benchmark baseline determination expires either when another baseline determination comes into force for the facility or when requested by the responsible emitter. This request needs to be in writing to the Regulator and specify the expiry date as 30 June of a particular year. *[subsection 55(3)]* The ability for the responsible emitter to request the expiry of their baseline determination is given because the covered emissions for a landfill may drop below 100,000 t CO₂-e and the responsible emitter has certainty that the landfill will no longer be covered by the safeguard mechanism. An example of this situation is that the landfill has closed and no longer accepts waste.

Subdivision 8—General variation and remaking of baseline determinations

- 3.289 The variation or remaking of an existing baseline determination is restricted to specific circumstances and can only be done by the Regulator after notifying and seeking comments from the responsible emitter. The Regulator's decision to vary or remake a baseline determination is a reviewable decision under section 56 of the Act. *[subsections 56(7) and 57(6)]*

Section 56: Variation relating to changes in carbon dioxide equivalence

- 3.290 The values used to determine the carbon dioxide equivalence of greenhouse gases, global warming potentials, are set out in section 2.02 of the NGER Regulations. Although unlikely to occur in the near term, updates to the global warming potentials occur periodically based on new scientific information. *[subsections 56(1)]*

For example, while carbon dioxide (CO₂) always has a global warming potential of one, each other greenhouse gas is given a value that represents its global warming potential comparative to CO₂. At the time the International Panel on Climate Change released its Second Assessment Report, it was scientifically understood that methane had the potential to contribute to global warming 21 times the same amount of CO₂. At the release of the Fourth Assessment Report, the scientific understanding had changed to set the global warming potential of methane to 25. The NGER Regulations incorporated this new value from 1 July 2015.

- 3.291 The baseline emissions number is calculated using the global warming potential values in force at the time of making the baseline determination. The only types of baseline determination not affected by global warming potential values are those calculated using emissions or emissions intensities comprised solely of carbon dioxide. For all other baseline determinations, the baseline emissions number must be varied when there are changes to the global warming potential values set out in section 2.02 of the NGER Regulations. *[subsection 56(2)]* Changed global warming potential values do not cause a change in the designated large facility threshold of 100,000 t CO₂-e or the baseline emissions number that applies to a designated large facility with no baseline determination.
- 3.292 The Regulator will vary the baseline determination using information that was the basis of making the existing baseline determination by updating the global warming potential values in force at that time with the new values. If the existing baseline determination used benchmark emissions intensities, then the determination must be varied using updated benchmark emissions intensities sourced from the Benchmark Emissions-Intensity Index in Schedule 1. *[paragraph 56(2)(c)]*
- For example, during the period 2009-10 to 2013-14 a large industrial complex's highest reported covered emissions were 110,000 t CO₂-e. This became the facility's baseline emissions number under a reported-emissions baseline determination. On 1 July 2016, the global warming potential values were updated in the NGER Regulations to reflect latest scientific findings triggering the Regulator to adjust all facilities' baselines to reflect the changed global warming potential values. The complex's baseline was adjusted upwards by 10,000 t CO₂-e to reflect the increase in global warming potential values of hydrofluorocarbons. Using the updated global warming potential values set out in the Regulations, the operator of the centre correctly reported a net emissions number for that year of 118,000 t CO₂-e. Because the facility's new baseline emissions number had been adjusted to 120,000 t CO₂-e, the facility remained 2,000 t CO₂-e below the baseline emissions number, and there was no excess emissions situation.
- 3.293 A varied baseline determination commences from the start of the financial year in which it was remade. The previous baseline determination applies until then. *[subsection 56(1)]*
- 3.294 A responsible emitter for a facility will be informed in writing that the Regulator intends to vary its baseline determination because of changes to global warming potential values. The notice will include what the baseline emissions number would be in the varied determination and invite comments by a specified date. *[subsection 56(4)]* The Regulator must consider any comments made by the specified date and then vary the baseline determination within 30 days of this date (unless further information is requested). *[subsection 56(5)]*
- 3.295 Similar to all other baseline determinations, as soon as practicable after varying the baseline determination the Regulator must notify the applicant in writing of the determination and publish details of the remade determination on its website. *[subsection 56(6)]* The type of details are listed in section 4 of the safeguard rule, and include the start and end date of the remade determination and the relevant facility.

Section 57: Remaking of baseline determinations because of error

- 3.296 There are three reasons why a decision to make a baseline determination or purported baseline determination may be remade. One is that it was made outside the limits of the Regulator's powers or made despite the Regulator lacking the power to do so, meaning that is subject to jurisdictional error. *[paragraph 57(1)(b)]*

For example, a jurisdictional error would be the Regulator making a benchmark-emissions baseline determination in response to a new facility application even though the Regulator was not satisfied with one or more of the new facility criteria or made an error of law in applying those criteria. The Regulator or a court would generally consider such decisions of no legal effect from the date that they were made.

- 3.297 The other reasons for remaking a baseline determination are that the baseline emissions number is incorrect, such as because a calculation error was made in determining the baseline emissions number or information provided to the Regulator by the responsible emitter was false or misleading in a material particular. *[paragraphs 57(1)(a) and 57(1)(c)]* The concept of revocation for the provision of false or misleading information is equivalent to section 38 of the *Carbon Credits (Carbon Farming Initiative) Act 2011*.
- 3.298 A remade baseline determination or a decision to refuse to make a determination commences from the start of the financial year that it was remade. The previous baseline emissions number applies until then, even if the baseline emissions number was incorrect or the original decision was treated as having no legal effect. *[subsection 57(5)]* This avoids putting a facility into an excess emissions situation which was beyond its control.
- 3.299 A responsible emitter for a facility will be informed in writing that the Regulator intends to remake its baseline determination. The notice will include what the baseline emissions number would be in the remade determination and invite comments by a specified date. *[subsection 57(2)]* The Regulator must consider any comments made by the specified date and then remake the baseline determination within 30 days of this date (unless further information is requested). *[subsection 57(3)]*
- 3.300 Similar to all other baseline determinations, as soon as practicable after remaking the baseline determination the Regulator must notify the applicant in writing of the determination and publish details of the remade determination on its website. *[subsection 57(4)]* The type of details are listed in section 4 of the safeguard rule, and include the start and end date of the remade determination and the relevant facility.

Section 58: Further information

- 3.301 The Regulator may require the responsible emitter to provide further information in connection with the variation or remaking of a baseline determination. Such a request is made in writing and will specify a due date for the applicant to provide the required information. *[subsection 58(1)]*

- 3.302 The consequence of the responsible emitter not complying with the Regulator's request for further information is that the Regulator may refuse to take any action in relation to varying or remaking the baseline determination until the information is provided. Alternatively, the Regulator may make assumptions about the required information that was not provided. *[subsection 58(2)]*

Part 4

Compliance

Outline of the Part

- 4.1 This Part provides guidance on the operation of the compliance measures set out in the safeguard rule.

Division 1—Exemption declarations

Sections 59, 60, 61 and 62: Exemption declarations

- 4.1 The Regulator can declare that an excess emissions situation does not exist in relation to a facility for a monitoring period under subsection 22XE(2) of the Act. Such a declaration, known as an exemption declaration, is subject to review by the Administrative Appeals Tribunal, as stipulated under section 56 of the Act.
- 4.2 Exemption declarations must only be made following the submission of an application by the responsible emitter. *[section 60]* Applications will only be considered for facilities whose net emissions number, excluding any decreases resulting from the surrender of prescribed units, exceeds the baseline emissions number for the monitoring period (i.e. causing an excess emissions situation). *[paragraph 62(2)(a)]*
- 4.3 The Regulator will specify the process, including the form, of the application, however applications must state why an exemption declaration is being sought (that is, the event constituting a natural disaster or criminal activity that caused the excess emissions situation). *[paragraph 60(2)(c)]* If the Regulator refuses an application to make an exemption declaration, the Regulator must notify the applicant in writing of its decision. *[subsection 62(5)]*
- 4.4 As soon as practicable after making an exemption declaration the Regulator must notify the applicant in writing of the declaration and publish details of the declaration on its website. *[subsection 62(4)]*

Direct and indirect results of relevant circumstances

- 4.5 The Act requires, under paragraph 22XE(4)(b), that for an exemption declaration to be made, the excess emissions situation must be the *direct result* of either a natural disaster or criminal activity. An excess emissions situation is a direct result of an event of these types if there is a direct causal link between the natural disaster or criminal activity and the increase in emissions at the facility and, further, the responsible emitter did not have an opportunity to prevent the excess emissions situation after the event. Excess emissions situations which are the *indirect result* of these events often involve a choice or financial decision to respond to a market circumstance caused by the event.

For example, a smelter normally acquires high-grade coal from a particular mine, which ceases operation because of a major flooding event. The smelter switches to a lower –grade coal because the price of high-grade coal has dramatically increased, due to supply stopping from the flooded mine.

- 4.6 This example illustrates that the relevant test to determine whether the excess emissions situation for which an exemption is sought is the direct result of an event is whether the excess emissions situation was caused by the event itself, or if it was caused by the responsible emitter’s reaction to the event. If the latter is true, irrespective of the nature or severity of the event, the potential excess emissions situation must not be considered to be the direct result of the event. In the above example, the excess emissions situation at the smelter is the result of the smelter operator’s decision to use the emissions intensive ore, not the earthquake at the mine. However, if the earthquake had opened a methane seam at the mine, which caused the mine to enter an excess emissions situation, the mine’s excess emissions situation would be the direct result of a natural disaster and hence may be eligible for an exemption declaration. This directness test will be applied by the Regulator upon receipt of an application for an exemption declaration, and will be based upon a review of the facts and evidence before it.

In another example, criminals destroy a series of transmission lines for a number of generators. As a result of the reduced supply, the wholesale electricity price increases dramatically. None of the increased emissions of the generators unaffected by the sabotage who meet the demand can be considered to be the direct result of the protestor’s criminal activity because the increased emissions are a result of their response to the increased wholesale electricity price.

However, if the criminals had instead lit the biomass pile at a generator, causing the emissions intensity of the fuel mix to increase as the biomass was substituted with coal, the resultant increase in emissions would be considered the direct result of the criminal activity.

Meaning of natural disaster

- 4.7 The term ‘natural disaster’ has its ordinary meaning within the safeguard rule. The word ‘disaster’ is defined by the Macquarie Dictionary as:
- an event, as a flood, fire, explosion, etc., which devastates a community and is beyond the scope of the community's own resources to manage, requiring assistance on a national scale to restore safe conditions, functioning communications and a continuing livelihood for the people.
- 4.8 The word ‘natural’ distinguishes disasters from environmental causes from those caused by human factors. For example, acts of war or terrorism are not considered natural disasters as they are caused by human activity. Severe weather conditions or events, such as wildfires, cyclones or floods, are to be considered natural disasters as their origins are not purely human in nature. There is some similarity between the meaning of natural disaster and the concept of an ‘Act of God’. An Act of God is commonly conceived to be exclusively due to natural causes and unable to be prevented by any amount of foresight and care reasonably to be expected.

Determining whether criminal activity has occurred

- 4.9 The Regulator can form the opinion that criminal activity has resulted in an excess emissions situation for the purposes of processing exemption declaration applications independently from any trial or conviction of a criminal offence. In other words, a criminal conviction is not necessary in order for the Regulator, as an administrative body, to have reasonable cause to believe that criminal activity has occurred so that it can make an exemption declaration. The opinion of the Regulator as to the occurrence of criminal activity will turn on the nature and quality of the facts and circumstances before it. Where the Regulator forms an opinion that criminal activity has occurred or that a responsible emitter is complicit in criminal activity, it does not and could not amount to a finding of criminal guilt akin to a court's decision.
- 4.10 Where the Regulator forms an opinion about the existence of criminal activity for the purposes of processing an exemption application, appeal is possible through the Administrative Appeals Tribunal. *[section 56 of the Act]*

Further information

- 4.11 The Regulator may require that a responsible emitter provides further information in relation to their application for an exemption declaration. *[section 61]* If the Regulator's request includes a deadline by which the further information must be given and the applicant fails to meet this deadline, the Regulator is not obliged to take any further action with respect to the application. *[subsection 61(2)]*

Decision making criteria

- 4.12 The Regulator must make an exemption declaration if the four criteria for making one have been satisfied. *[subsection 62(2)]* The first criterion is that the net emissions number, excluding any decreases resulting from the surrender of prescribed units, exceeds the baseline emissions number for the monitoring period. *[paragraph 62(2)(a)]* The second criterion is that the baseline exceedance mentioned in the first criterion must be the direct result of a natural disaster or criminal activity. *[paragraph 62(2)(b)]* The third criterion is that, if the exemption declaration is sought for an excess emissions situation resulting from criminal activity, the responsible emitter cannot have been complicit in the criminal activity. *[subparagraph 62(2)(c)(iii)]* The responsible emitter does not have to have been found guilty of a criminal offence for the Regulator to have reasonable cause to believe that the responsible emitter was complicit in criminal activity.
- 4.13 The final criterion is that the responsible emitter must have taken reasonable steps to mitigate the risks of the natural disaster or criminal activity resulting in the excess emissions situation both before and after the event. *[paragraphs 62(2)(c) and 62(2)(d)]* Such reasonable steps before an event could include industrial design aimed at improving resilience to extreme weather conditions, procedures for greenhouse gas management during natural disasters, security arrangements or emergency shut-down procedures. Reasonable steps after an event occurs include promptly acting to replace damaged emissions reduction equipment, low emissions fuel sources or taking reasonable actions to limit emissions in the remaining part of the applicable monitoring period.

Timing

- 4.14 Unless otherwise agreed with the Regulator, exemption declaration applications must be lodged with the Regulator prior to the 31 October following the end of the monitoring period for which the exemption declaration is sought. *[subsection 60(3)]* This allows a minimum period of four months between the event triggering the exemption declaration eligibility and the application deadline.
- 4.15 In return, the Regulator must take all reasonable steps to ensure that a decision is made on the application within 60 days after the application was made, or, if the Regulator required the applicant to give further information under subsection 50(1), within 60 days after the applicant gave the Regulator the information *[subsection 62(3)]* These deadlines ensure adequate notice of the application result before the 1 March compliance date (see subsection 22XF(1) of the Act).

63 Revocation of exemption declaration because of false or misleading information

- 4.16 There may be grounds for the Regulator to revoke an exemption declaration if information provided by the responsible emitter in connection with the making of an exemption declaration was false or misleading in a material particular. Material particular means that the Regulator may not have decided to make the exemption declaration if the information in question had not been provided. *[subsection 63(1)]*
- 4.17 The Regulator will notify the relevant responsible emitter of its intention to revoke their exemption declaration and give them the opportunity to provide comments by a date specified in the notice. Within 30 calendar days of this date, the Regulator will use all reasonable endeavours to decide to revoke, or not, the exemption declaration considering any comments received by the due date in the notice. *[subsections 63(2) and 63(3)]*
- 4.18 If the Regulator revokes a declaration, then it must notify the responsible emitter about this and publish details of the revocation of the declaration on its website. *[subsection 63(4)]* The revocation would take effect at least 30 days after notification, providing time for a responsible emitter to surrender credits to avoid any non-compliance.

Division 2—Declared multi-year periods

Sections 64, 65, 66 and 67: Declared multi-year periods

- 4.19 The Regulator can declare that a monitoring period could be two or three financial years under a declared multi-year period, instead of the default single financial year. *[paragraphs 67(3)]* Such a declaration, known as a multi-year period declaration, is subject to review by the Administrative Appeals Tribunal. *[section 56 of the Act]*

- 4.20 If the responsible emitter changes during the declared multi-year period, then the monitoring period will be shorter than the declaration. In this case, the previous responsible emitter would be covered by a monitoring period that began when the declared multi-year period started and ends on the day that they ceased being the responsible emitter (which in this scenario would be part way through the declared multi-year period). The new responsible emitter would have a monitoring period that begins on the day they became the responsible emitter and finishes on expiry of the multi-year period declaration, unless the declaration is revoked on their request.
- 4.21 Multi-year period declarations may only be made based on an application by the responsible emitter. *[section 65]* Applications will only be considered for facilities whose covered emissions are likely to exceed the baseline emissions number for the monitoring period in force at the time of application. *[subsection 67(2)]*
- 4.22 An application cannot be made if the declaration would overlap with a previous multi-year period declaration or the applicant has already applied for a variation to the baseline determination because of a reduction in emissions intensity unless the Regulator refused to make the variation (see section headed *Subdivision 6—Variation of baseline determination for reduction in emissions intensity* on page 78 of the Explanatory Statement). *[subsection 65(2)]* This avoids there being two approaches being simultaneously implemented in response to an excess emissions situation.
- 4.23 The Regulator will specify the process, including the form, of the application, however applications must state why a multi-year period declaration should be made. This statement should explain how the multi-year period declaration sought would enable the responsible emitter to avoid an excess emissions situation for the first year of the declared multi-year period. *[subsection 65(3)]*
- 4.24 Once the Regulator has refused or approved an application to make a multi-year period declaration, the Regulator must notify the applicant in writing of its decision. If the decision was to make the declaration then details must be published on the Regulator's website. *[subsections 67(5) and 67(6)]*

Further information

- 4.25 The Regulator may require that a responsible emitter provides further information in relation to their application for a multi-year period declaration. *[section 66]* If the Regulator's request includes a deadline by which the further information must be given and the applicant fails to meet this deadline, the Regulator is not obliged to take any further action with respect to the application. *[subsection 66(2)]*

Decision making criteria

- 4.26 The Regulator has discretion regarding whether or not to make a multi-year period declaration. Relevant considerations include the responsible emitter's compliance history *[paragraph 67(2)(a)]*, the strength of the evidence provided that the requested declared multi-year period would enable the responsible emitter to avoid an excess emissions situation *[subsection 67(2)(b)]* and whether the responsible emitter has proposed to enter an enforceable undertaking *[paragraph 67(2)(c)]*. If an enforceable undertaking has been proposed, the matters prescribed in the undertaking could include measures aiming to reduce the covered emissions of the facility, the net emissions number, or both. Generally, it is expected that a responsible emitter would only propose to enter an enforceable undertaking due to having a history of noncompliance. This would help reassure the Regulator that measures for avoiding an excess emissions situation will be implemented despite a history of noncompliance.

For example, a measure specified in an enforceable undertaking proposed in conjunction with a multi-year period declaration application may aim to reduce the scope 1 emissions of the facility. Alternatively, it could outline a plan to acquire and surrender prescribed units. In addition to these criteria, the Regulator may consider other matters it considers relevant. *[paragraph 67(2)(d)]*

Timing

- 4.27 A multi-year period declaration application must be lodged with the Regulator prior to the 31 October following the end of the first financial year of the requested multi-year period. *[subsection 65(4)]* However, if the responsible emitter provides reasons why it was impractical to meet the 31 October deadline, the Regulator may accept an application made no later than 1 February after the deadline. *[subsection 65(6)]*
- 4.28 In return, the Regulator must take all reasonable steps to ensure that a decision is made on the application within 60 days after the application was made, or, if the Regulator required the applicant to give further information under subsection 66(1), within 60 days after the applicant gave the Regulator the information *[subsection 67(4)]* These deadlines help ensure adequate notice of the application result before the 1 March compliance date, set out in subsection 22XF(1) of the Act.

Section 68: Variation or revocation of multi-year period declaration on request

- 4.29 The responsible emitter for a facility with a multi-year period declaration in force, can apply to the Regulator to have it changed or revoked. The possible changes are to increase a two year period to three years, or to decrease a three year period to two years. *[subsection 68(1)]* An example of where this provision could be useful is if the responsible emitter for a facility changes midway through a multi-year period declaration and the new responsible emitter wishes to avoid an excess emissions situation in a different way.

- 4.30 An application must include the reasons for the requested change or revocation of the multi-year period declaration, and if relevant, include the written consent of others that could be impacted by the change or revocation. *[subsection 68(2)]*

For example, a designated large facility with a multi-year monitoring period is being sold. The incumbent responsible emitter has agreed as a condition of the sale to revoke the multi-year period declaration. The application must include written consent of the revocation from the person who will be the responsible emitter following the sale.

- 4.31 Once the Regulator has decided to accept or not the application, they must provide written notice of their decision to the application. If the decision was to accept the application, then the Regulator must also publish the details of the varied or revoked declaration on its website. *[subsections 68(4) and 68(5)]*

Section 69: Revocation of multi-year period declaration because of false or misleading information

- 4.1 There may be grounds for the Regulator to revoke a multi-year period declaration if information provided by the responsible emitter in connection with the making of the declaration was false or misleading in a material particular. Material particular means that the Regulator may not have decided to make the multi-year period declaration if the information in question had not been provided. *[subsection 69(1)]*
- 4.2 The Regulator will notify the relevant responsible emitter of its intention to revoke their declaration and give them the opportunity to provide comments by a date specified in the notice. Within 30 calendar days of this date, the Regulator will use all reasonable endeavours to decide to revoke, or not, the multi-year period declaration considering any comments received by the due date in the notice. *[subsections 69(2) and 69(3)]*
- 4.3 If the Regulator revokes a declaration, then it must notify the responsible emitter about this and publish details of the revocation of the declaration on its website. *[subsection 69(4)]*

Division 3—Notification and publication requirements

Section 70: Operation of this Division

- 4.4 This division provides for advisory notices and the general publication of information about the safeguard mechanism.

Section 71: Advisory notices

- 4.5 The Regulator has broad discretion over the content of the advisory notices it provides to responsible emitters in the course of administering the safeguard mechanism, as stipulated under section 22XP of the Act. There are, however, certain matters about a facility that the Regulator must notify the responsible emitter *[subsection 71(1)]*

Certain net emissions number increases and decreases

- 4.6 The Regulator must notify the responsible emitter that the net emissions number of their facility has increased because ACCUs were issued in relation to the facility in accordance with subsection 22XK(4) of the Act. *[subsection 71(1)(a)]* This notice must include the unique identifiers of each ACCUs were issued in relation to the facility *[subsection 71(2)]*
- 4.7 The Regulator must also notify the responsible emitter that the net emissions number of their facility has decreased as a result of deemed surrender in accordance with subsection 22XN(9) of the Act. *[subsection 71(1)(b)]* This notice must include the unique identifiers of each Australian Carbon Credit Units deemed to have been surrendered in relation to the facility *[subsection 71(2)]*
- 4.8 These mandatory notification requirements provide responsible emitters with the transparency necessary to manage their net emissions number and hence their duty to avoid an excess emissions situation. The Regulator may also notify responsible emitters of other information that promotes this goal, or that they determine to be otherwise useful in administering the safeguard provisions *[subsection 71(3)]*
- 4.9 The safeguard rule enables a responsible emitter to request the Regulator to provide them with reports submitted under the Act that are potentially relevant to the making or variation of their baseline determination. *[subsection 71(4)]* This provision is particularly useful for situations that the responsible emitter has changed and secrecy provisions may have prevented the Regulator from giving the responsible emitter the requested reports.

Section 72: Publication

- 4.10 The Regulator must publish certain information about designated large facilities. The timing for publishing information follows when updated information becomes available. Covered emissions information is only required to be published after facilities' reports have been submitted under the Act. Information on the net emissions number and surrendering of prescribed carbon units is only required to be published following the 1 March compliance date for the relevant monitoring period. *[subsection 72(2) and 72(3)]*
- 4.11 For each monitoring period, in relation to a designated large facility this information includes *[paragraphs 72(1)(a)]*:
- the responsible emitter
 - covered emissions
 - surrendered prescribed carbon units
 - the baseline emissions number
 - covered emissions from electricity generation on the basis that the year is not a sectoral-baseline financial year (for facilities that are grid-connected electricity generators)
 - the start and end dates of the monitoring period, declared multi-year period and exemption declaration (if any has been made).

- 4.12 The approach to publication of information under the safeguard mechanism is to ensure that commercially sensitive data is not published, but sufficient data is released to allow the public to assess progress against safeguard mechanism objectives. In relation to each grid-connected electricity generator, irrespective if they are a designated large facility or not, the Regulator will publish the generator's covered emissions from electricity generation on the basis that the year is not a sectoral-baseline financial year. *[paragraphs 72(1)(c)]* This is important for assessing whether the sectoral-baseline has been breached.
- 4.13 If an excess emissions situation exists in relation to the facility for the monitoring period, the Regulator must also publish *[paragraph 72(1)(b)]*:
- the responsible emitter
 - the start and end dates of the excess emissions situation.

Non-disclosure requests

- 4.14 Entities reporting under the Act may request that information they report is not published if that information could reveal a trade secret or otherwise diminish or destroy the commercial value of the information (see subsection 25(1) of the Act). Such requests should be made to the Regulator in writing and can relate to information contained in reports submitted under the Act.

Part 5

Registration, reporting and record-keeping

Outline of the Part

- 5.1 This Part provides an explanation of the registration, reporting and record-keeping requirements set out in the safeguard rule.
- 5.2 These requirements apply to responsible emitters who will submit reports under section 22XB of the Act, once the amended Act commences. These responsible emitters will typically be trusts or non-constitutional corporations. Other responsible emitters that submit reports under sections 19, 22G, 22X of the Act, such as controlling corporation or group entities, have equivalent registration, reporting and record-keeping requirements under the NGER Regulations.

Division 1—Registration

- 5.3 Section 15B of the Act requires responsible emitters of safeguard facilities who are not otherwise registered to apply to be registered under the Act. Once registered, the Act places obligations on responsible emitters such as for reporting and recordkeeping.

Section 74: Application requirements

- 5.4 Paragraph 15B(4)(c) of the Act requires the safeguard rule to set out what information must be included in an application for registration. Other applications for registration under the Act must meet the information requirements set out in the NGER Regulations.
- 5.5 The information required in an application has been made equivalent to the requirements of other applications for registration under the Act, and limited to the information needed for the safeguard mechanism. This information is *[subsections 74(1) and 74(2)]*:
- the applicant's name and trading name (if any)
 - which section of the Act the applicant is applying under (which should be subsection 15B of the Act)
 - the year for which the applicant is first required to register
 - if a personal identification number has been issued by the Regulator to the applicant—the applicant's personal identification number
 - if the applicant is a subsidiary of a controlling corporation registered under the Act—a statement to that effect, and the identifying details of the controlling corporation
 - identifying information if not previously given to the Regulator.

Division 2—Reporting

- 5.6 The operation of the safeguard mechanism requires safeguard facilities' covered emissions to be reported on a financial year basis. Reporting requirements set out in sections 19, 22G, 22X of the Act may apply to most but not all types of responsible emitters, such as those who are not a controlling corporation or a group member. In the situation that one of these sections does not apply to a responsible emitter, then, the reporting requirements under section 22XB of the Act will apply to the responsible emitter. This Division of the safeguard rule sets out the information required in a section 22XB report.

Section 76: Required information

- 5.7 The information required in a section 22XB report under the Act has been made equivalent to the requirements of other report types submitted under the Act and limited to the information needed for the safeguard mechanism.
- 5.8 If the responsible emitter is not a corporation to which Subdivision 4.4.2 and 4.4.3 and regulations 4.04A and 4.27 of the of the NGER Regulations apply, then consistency in reporting requirements has been achieved by cross-referencing to the requirements set out in Subdivision 4.4.2 and 4.4.3 and regulations 4.04A and 4.27 as if the responsible emitter was such a corporation. *[paragraph 76(1(b))* In particular, the references in the NGER Regulations to a 'facility of the corporation' would apply to the facility of the responsible emitter subject to reporting under section 22XB of the Act.
- 5.9 Other information required in a report under section 22XB of the Act is:
- identifying information of the responsible emitter
 - covered emissions from the facility
 - if relevant, information about significant changes to the facility's activity (explained in the following section). *[paragraphs 76(1)(a), 76(1)(c) and 76(1)(d)]*

Section 77: Reporting a change in principal activity for facility

- 5.10 A facility's emissions reported under the Act are attributed to an industry sector for the purposes of the Act. It is important that emissions reported under section 22XB of the Act are also attributed to the correct industry sector. If the facility's activity changes substantially, then this should be reported as its emissions may need to be attributed to a different industry sector. This requirement mirrors regulation 4.31 of the NGER Regulations.
- 5.11 The definition of principal activity is important to the requirements set out in section 74. It means the facility's activity that results in the production of a product or service that is produced for sale on the market and produces the most value for the facility out of any of the activities forming part of the facility. *[subsection 77(4)]*

- 5.12 To help avoid a reporting requirement for a temporary change in a principal activity, this reporting requirement only applies in the case that the facility's activity changed more than 24 months ago. The requirement is for the responsible emitter to *[subsections 77(1), 77(2) and 77(3)]*:
- identify the new principal activity for the facility and the industry sector to which the principal activity is attributable in accordance with Subdivisions 2.4.2 and 2.4.3 of the NGER Regulations
 - record the date that the principal activity changed and the new principal activity
 - report the new industry sector in the report for the reporting period that contains the date 24 months after the date that the principal activity changed.

Division 3—Record-keeping

Section 78: Form of records

- 5.13 It is important that records are kept to monitor compliance with the Act. These records must be kept in a form that is easily and quickly accessible for inspection and audit, as required by regulation 4.34 of the NGER Regulations. The form may be electronic or hard format. *[section 78]*

Schedule 1—Benchmark Emissions-Intensity Index

- 6.1 ***Benchmark Emissions-Intensity Index*** is set out in Schedule 1 and means index of emissions intensity per unit of a production variable (including the benchmark capture efficiency rate for non-legacy greenhouse gas emissions).
[section 4]
- 6.2 This Schedule will set out benchmark levels of emissions intensity per unit of a production variable for certain kinds of facilities. These facilities will be those who are eligible for a benchmark-emissions baseline determination provided there is a benchmark emissions intensity relevant to their facility. The emissions intensity values may be used to make either a benchmark-emissions baseline determination (see the section headed *Subdivision 4—Benchmark-emissions baselines determination* on page 61 of the Explanatory Statement) or a production-adjusted baseline determination (see the section headed *Subdivision 5—Production-adjusted baseline determination* on page 71 of the Explanatory Statement) for these kinds of facilities.
- For example, a possible benchmark emissions intensity applicable to coal mine facilities could be the quantity of covered emissions (t CO₂-e) per tonne of run-of-mine coal produced.
- 6.3 This Schedule will also set out the benchmark capture efficiency rate for non-legacy greenhouse gas emissions which is needed to make a landfill-benchmark baseline determination for a landfill facility (see section headed *Subdivision 7—Landfill-benchmark baseline determination* on page 86 of the Explanatory Statement).
- For example, the benchmark capture efficiency rate applicable to landfill facilities would be expressed as the quantity of covered emissions (non-legacy greenhouse gas emissions) (t CH₄) per quantity of non-legacy greenhouse gas emissions generated in the landfill (t CH₄).
- 6.4 Benchmark emissions intensities will be developed by the Department of the Environment, in consultation with stakeholders. The Minister has the final decision to include a benchmark emissions intensity in the Benchmark Emissions-Intensity Index, which will be done through an amendment to the safeguard rule.

Example scenarios

Example scenarios demonstrate how different baselines are made and relate to two fictitious companies—‘Gil Co’, a silicon manufacturer, and ‘Pear Co’, a bus company. The theoretical examples included in the scenarios have been simplified to illustrate the policy intent of the mechanics of the *National Greenhouse and Energy Reporting (Safeguard Mechanism) Rule 2015* (the safeguard rule). Stakeholders should seek their own advice on the application of the rules to their individual circumstances.

Gil Co, who is the responsible emitter for Facility A, produces silicon and has reported under the *National Greenhouse and Energy Reporting Act 2007* (the Act) since 2009-10. Example scenarios show how the following baselines are set for Gil Co:

- reported-emissions baseline determination
- variation of baseline determination for reduction in emissions intensity
- calculated-emissions baseline determination (resulting from a significant expansion)
- production-adjusted baseline determination.

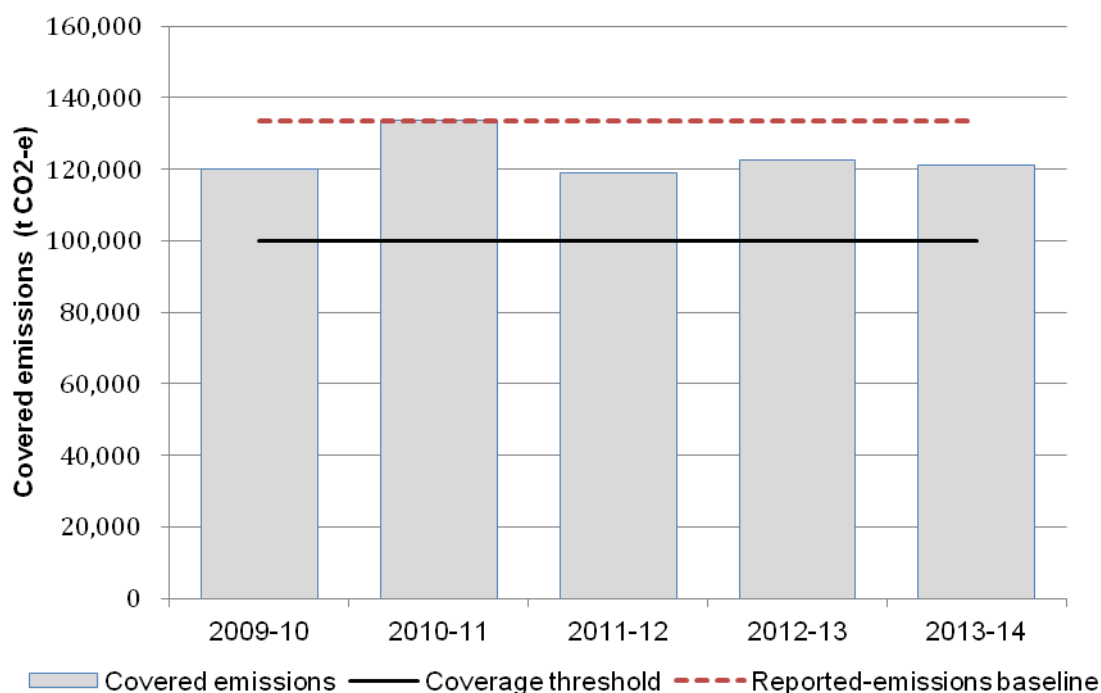
Pear Co is the responsible emitter for five inter-state transport facilities, which have each reported under the Act over various time periods. The example scenario for Pear Co demonstrates how a reported-emissions baseline determination is made for a transport facility that elects to report on a national facility basis.

Example scenarios for Gil Co

Reported-emissions baseline determination (Part 3, Division 2, Subdivision 2)

- Gil Co, a silicon producer, has a single facility (Facility A).
- Gil Co has reported the emissions from Facility A under the Act every financial year since 2009-10.
- Its covered emissions are consistently above 100,000 t CO₂-e (see Figure 4).

Figure 4—Covered emissions over the five financial years beginning on 1 July 2009



In the above example, the Clean Energy Regulator (the Regulator) must make a reported-emissions baseline determination for Facility A because it meets the relevant criteria (paragraph 14(1)(a)), that is, emissions from Facility A were reported for every year from 2009-10 to 2013-14 and Facility A's covered emissions exceeded 100,000 t CO₂-e in at least one of these years.

Prior to making the determination, the Regulator must provide written notice to Gil Co, who is the responsible emitter (section 16).

The baseline emissions number for Facility A will be 133,605 t CO₂-e per year, which is the reported scope 1 emissions in 2010-11, as the highest annual covered emissions during the five financial years beginning on 1 July 2009 (subsection 17(1)). This baseline emissions number will apply from 1 July 2016, which is when the safeguard mechanism commences (subsection 18(1)).

This baseline determination continues to be in force until it is replaced by another baseline determination. It also comes back into force at the expiry of any subsequent determination (subsection 18(3)).

Table 2—Key elements of a reported-emissions baseline determination

Element	Treatment and reference
Criteria <i>Reported-emissions baseline determination</i>	Relate to the availability of historical data (subsection 14(1))
Application deadline	Not applicable

	This kind of baseline determination is made by the Regulator and not in response to an application.
Application information	Not applicable This kind of baseline determination is made by the Regulator and not in response to an application.
Audit requirement	Not applicable
Baseline emissions number	Based on the highest annual covered emissions during the five financial years beginning on 1 July 2009 (section 17)
Commencement	Commences on 1 July 2016 unless a calculated-emissions baseline has been made with effect from 1 July 2016 (section 18)
Expiry	This determination continues to be in force until it is replaced by another determination. It may also come back into force at the expiry of a subsequent determination, depending on how many and which determinations have been made since the reported-emissions baseline was made (section 18)

Variation of baseline determination for reduction in emissions intensity (Part 3, Division 2, Subdivision 6)

- In 2017-18 (the second year of the safeguard mechanism) Facility A's covered emissions of 135,741 t CO₂-e exceed the baseline emissions number of 133,605 t CO₂-e (see Figure 5). The increase in emissions was a result of greater production of silicon at Facility A in 2017-18.
- However, the emissions intensity (emissions per tonne of silicon) at Facility A also improved from 1.51 t CO₂-e /t silicon in 2010-11 to 1.36 t CO₂-e /t silicon in 2017-18.
- The total production and emissions intensity of Facility A for the period 2009-10 to 2017-18 is represented in Figure 6.

Figure 5—Covered emissions over the period 2009-10 to 2017-18

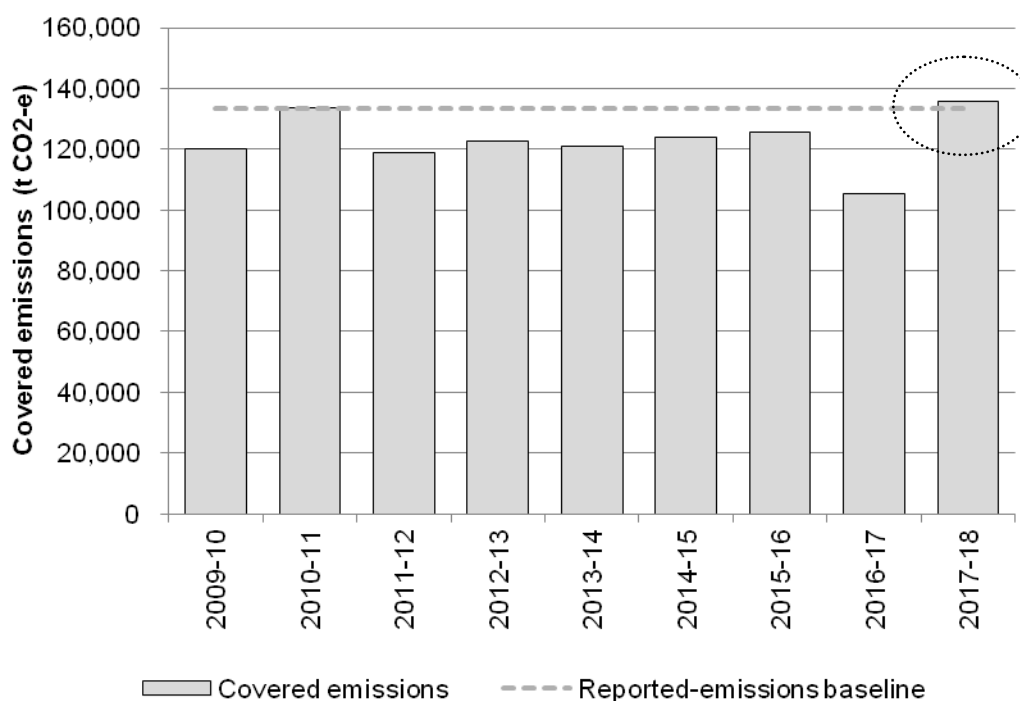
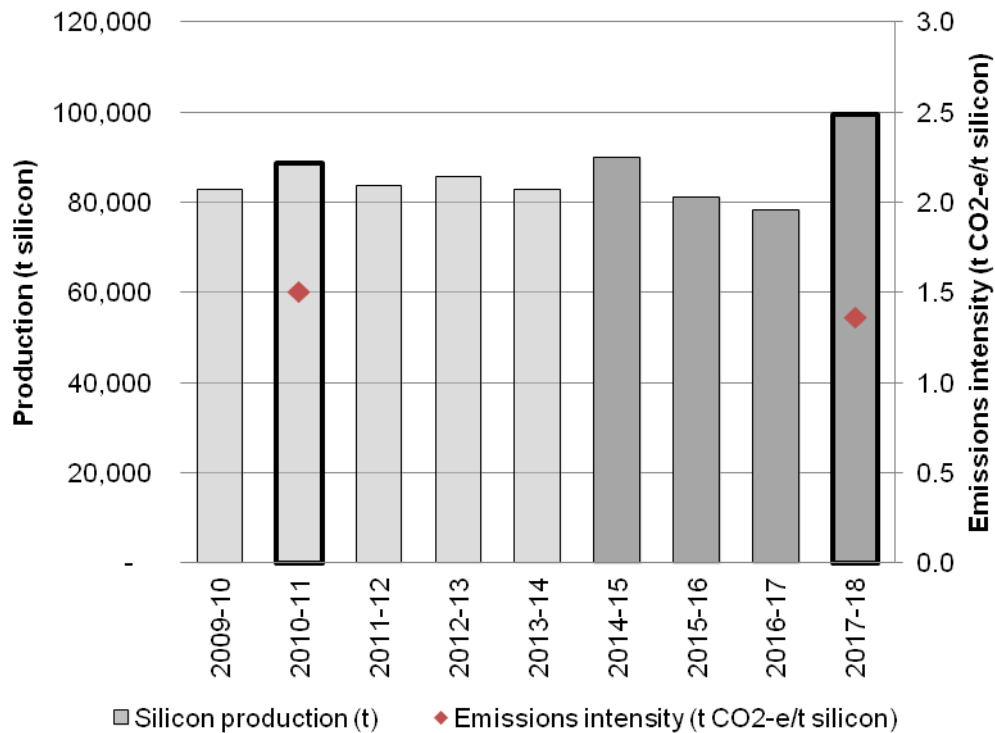


Figure 6—Production data and emissions intensity in 2010-11 and 2017-18



To avoid an excess emissions situation, Gil Co is eligible to apply for a variation to Facility A’s baseline determination because of a reduction in emissions intensity (section 46). Gil Co must apply by 31 October 2018 (subsection 46(4)) and include information to demonstrate that Facility A meets the criteria (section 48) as well as an audit report (section 49). The Regulator must be satisfied that the application meets certain conditions before making the determination (subsection 51(2)).

In this example, Facility A meets the emissions intensity test because the emissions intensity of silicon production in 2017-18 is lower than the emissions intensity in the baseline intensity comparison year (2010-11) (subsection 47(1)).

As a result, Facility A’s baseline emissions number for 2017-18 is revised to be 135,741 t CO₂-e and therefore Facility A does not exceed its baseline emissions number (subsection 51(1)).

The variation only applies to the baseline emissions number in a single financial year and the original baseline emissions number in the reported-emissions baseline determination (133,605 t CO₂-e) applies again from 2018-19 (section 51 and paragraph 18(3)(b)).

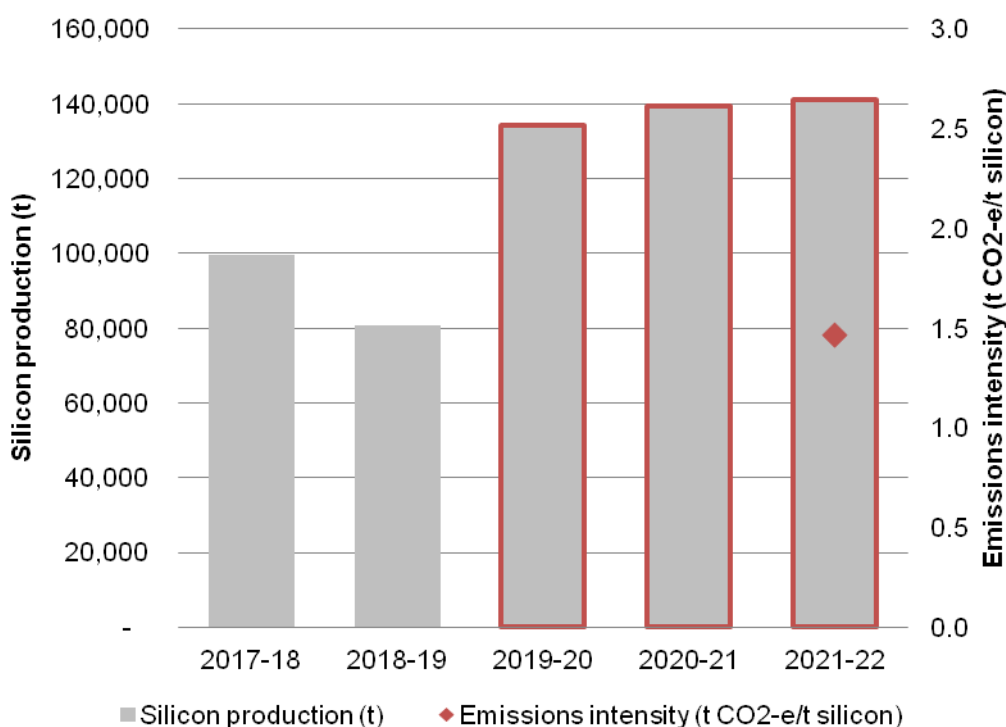
Table 3—Key elements of a variation of baseline determination for reduction in emissions intensity

Element	Treatment and reference
<p>Criteria</p> <p><i>Variation of baseline determination for reduction in emissions intensity</i></p>	<p>Relate to the facility having higher emissions than the baseline emissions number but a lower emissions intensity than the baseline intensity comparison year (expressed in tonnes CO₂-e per unit of the production variable). The baseline intensity comparison year generally relates to the determination that currently applies to the facility (sections 4, 6 and 47)</p> <p><i>Note: Where subsequent applications for a baseline variation are made, eligibility requires demonstrating that a facility's emissions intensity is lower than that established as part of the previous variation.</i></p>
Application deadline	Generally, no later than 31 October after the end of the financial year for which the baseline is to be varied (section 46).
Application information	Relate to the quantity and emissions-intensity of all production variables produced at the facility (section 48).
Audit requirement	Yes. The audit must, among other things, ensure that the emissions-intensity test is satisfied (section 49).
Baseline emissions number	Will be the covered emissions in the financial year for which the baseline is to be varied (section 51).
Commencement	On 1 July in the financial year for which the baseline is to be varied (section 51).
Expiry	The variation only applies to a single financial year (section 51).

Calculated-emissions baseline determination (significant expansion) (Part 3, Division 2, Subdivision 3)

- Over an eleven month period during 2018-19 Facility A significantly expanded its maximum productive capacity by over 50 per cent.
- The increase in production commences in 2019-20.
- Gil Co reasonably expects that this expansion will cause its baseline emissions number to be exceeded in 2019-20 and would like a calculated-emissions baseline for the period 2019-20 to 2021-22.
- The total expected production and emissions intensity of Facility A for the period 2017-18 to 2021-22 is represented in Figure 7 (the production in 2017-18 and 2018-19 is based upon actual data and the remaining three year based on forecasts).

Figure 7—Production data and emissions intensity over the period 2017-18 to 2021-22



In this example, Facility A would be eligible for a calculated-emissions baseline determination as it meets the significant expansion criteria outlined in section 24, including:

- Facility A's covered emissions are greater than 100,000 t CO₂-e (subsection 24(7))
- the increase in maximum productive capacity of the equipment installed and used at Facility A was greater than 20 per cent the maximum productive capacity before the significant expansion began (or relates to the production of a new production variable) (subsection 24(2))
- the relevant expansion started after 1 July 2014 and was completed prior to the period to be covered by the calculated-emissions baseline determination (subsection 24(5))
- a calculated-emissions baseline determination is not currently in force for Facility A (subsection 24(9)).

The baseline emissions number for Facility A will be calculated based on an audited assessment of Gil Co's estimate of the highest expected production level of silicon and the expected emissions intensity of production over the proposed duration of the calculated-emissions baseline determination (2019-20 to 2021-22).

In the relevant three year period, Gil Co estimates that production will be highest in 2021-22 with an estimated production of 148,000 tonnes of silicon. Based on the equipment and technology employed at Facility A and based on the emissions-intensity calculation criteria (section 6), Gil Co expects that the emissions intensity for the production of silicon in 2021-22 will be 1.55 t CO₂-e per tonne of silicon. On this basis, the baseline emissions number for the duration of the calculated-emissions baseline determination would be 229,400 t CO₂-e (i.e. 1.55 t CO₂-e per t silicon × 148,000 t silicon) (subsection 30(3)).

Gil Co must submit its application to the Regulator after 1 July 2018 and no later than 31 October 2020 (subsection 22(3)). As part of its application Gil Co must provide an audit report, which assesses, among other things whether the significant expansion criteria are satisfied (paragraph 22(2)(d) and section (28)). The Regulator must be satisfied with the information provided in the application before making the determination (subsection 30(2)).

The calculated-emissions baseline emissions number will apply from Gil Co's requested start date of the determination (1 July 2019) and expires at the end of three years (section 31). From 1 July 2022 (expiry of the calculated-emissions baseline determination) the reported-emissions baseline determination comes back into force, unless Gil Co applies for a production-adjusted baseline determination (subsection 40(1)).

Table 4—Key elements of a calculated-emissions baseline determination (significant expansion)

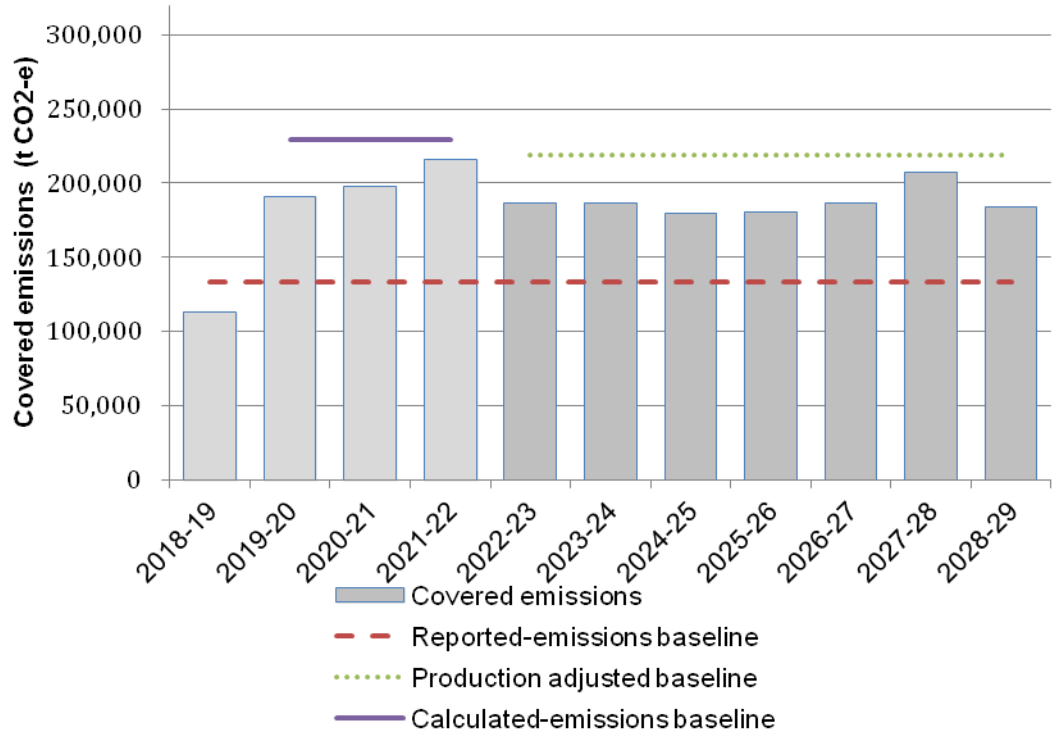
Element	Treatment and reference
Criteria <i>Calculated-emissions baseline determination (significant expansion)</i>	Relate to the timing of the significant expansion and whether the increase in maximum productive capacity is greater than 20 per cent (section 24). <i>Note other criteria under the calculated-emissions baseline determination are set out in:</i> <ul style="list-style-type: none"> • Section 23 (new facility) • Section 25 (inherent emissions variability) • Section 26 (initial calculated baseline)
Application deadline	Generally, no earlier than 1 July in the year before the calculated baseline is to commence and not later than 31 October after the end of the first financial year in which the calculated baseline is to apply (section 22).
Application information	Relate to substantiating that the relevant criteria are satisfied and estimating the emissions intensity and highest expected production level over the period of the calculated-emissions baseline determination (section 27).
Audit requirement	Yes. The audit must, among other things, ensure that the criteria are satisfied and that the production and emissions intensity information is supported by historical data (section 28).
Baseline emissions number	Must be the quantity of expected high-point in production multiplied by the expected emissions intensity (expressed in tonnes CO ₂ -e per unit of the production variable)(subsection 30(3))
Commencement	Generally on 1 July in the financial year requested in the application. For significant expansions, the determination will either start on the last year of, or the year immediately following, the relevant expansion period. The relevant expansion period is the period of which a significant expansion must be demonstrated (sections 24 and 31).
Expiry	Generally, three years after the requested start date. For large new

	<p>facilities, the determination remains in force for five years.</p> <p>Once the calculated-emissions baseline determination expires the reported-emissions baseline determination comes back into force, unless another kind of baseline determination is made (section 31).</p>
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Production-adjusted baseline determination (significant expansion) (Part 3, Division 2, Subdivision 5)

At the end of 2021-22 Facility A’s calculated-emissions baseline determination has expired and Gil Co applies for a production-adjusted baseline determination.

Figure 8—Covered emissions over the period 2018-19 to 2028-29



Gil Co is eligible to apply for a production-adjusted baseline determination because Facility A had a calculated-emissions baseline determination and it has now expired (subsection 40(1)).

Gil Co has requested that the start date of the production-adjusted baseline determination is 1 July 2022 (paragraph 40(2)(b)).

The baseline emissions number is ascertained from:

- the highest actual annual production during the period covered by the calculated-emissions baseline determination (section 4 and paragraph 41(1)(a))—141,045 tonnes silicon in 2021-22 (which was lower than the earlier *estimate* used for the calculated-emissions baseline determination), and

- the expected emissions intensity per tonne of silicon, which is determined from the calculated-emissions baseline determination (paragraph 41(1)(b))—1.55 t CO₂-e/t silicon.

On this basis the baseline emissions number for Facility A under the production-adjusted baseline determination will be 141,045 t silicon × 1.55 t CO₂-e/t silicon = 218,620 t CO₂-e (subsection 44(3)).

Gil Co must submit its application to the Regulator after 1 July 2022 and no later than 31 October 2023 (subsection 40(3)). As part of its application Gil Co must provide an audit report, which assesses, among other things whether production figures are fairly stated and supported by historical data (paragraph 40(2)(d) and section 42). The Regulator must be satisfied with the information provided in the application before making the determination (subsection 44(2)).

Table 5—Key elements of a production-adjusted baseline determination

Element	Treatment and reference
Criteria <i>Production-adjusted baseline determination (significant expansion)</i>	Relates to whether the facility has had a calculated-emissions baseline determination or has had, or could have been eligible for, a benchmark-emissions baseline determination (section 40).
Application deadline	Generally, no earlier than the requested start date of the determination and not later than 31 October after the end of the first financial year in which the production-adjusted baseline is to apply (section 40).
Application information	Relates to substantiating actual production level during the production assessment period (section 41).
Audit requirement	Yes. The audit must, among other things, ensure that the production information is supported by historical data (section 42).
Baseline emissions number	Generally based on production in the production assessment period multiplied by the expected emissions intensity (expressed in tonnes CO ₂ -e per unit of the production variable). Separate calculations apply if the determination is to commence after a benchmark-emissions baseline determination (section 44).
Commencement	Generally on 1 July in the financial year requested in the application. A later date is applied where the determination is made after the end of the financial year requested in the application (section 45).
Expiry	This determination continues to be in force until it is replaced by another determination (section 45).

Summary

Figure 9 shows Facility A's covered emissions and baselines over the period 2009-10 to 2028-29, highlighting the years covered by each of the various types of baseline determinations and the changes to the baseline emissions number over the period.

Figure 9—Covered emissions and baseline emissions number



Example scenario for Pear Co

Reported-emissions baseline setting for a transport facility that elects to report on a national basis

A corporation (Pear Co) provides a coach service that transports passengers within and between mainland Australian states. For the purpose of reporting under the Act, it operates *road passenger transport facilities* that are defined for each of these five states: NSW, QLD, SA, VIC and WA. Pear Co is identified as the responsible emitter for each of these facilities.

Pear Co would like to opt-in to define its facilities on a national basis from 1 July 2016, which is enabled by the proposed amendments to the NGER Regulations (proposed subregulation 2.19A).

Pear Co's state facilities have reported under the Act for different lengths of time:

- the NSW, QLD and VIC transport facilities have reported for all financial years since 2008-09

- the SA transport facility has reported each financial year since 2010-11
- the WA facility has only reported since 2011-12.

The VIC facility has had covered emissions that are consistently above 100,000 t CO₂-e. The QLD and NSW facilities have reported covered emissions above 100,000 t CO₂-e for a number of financial years.

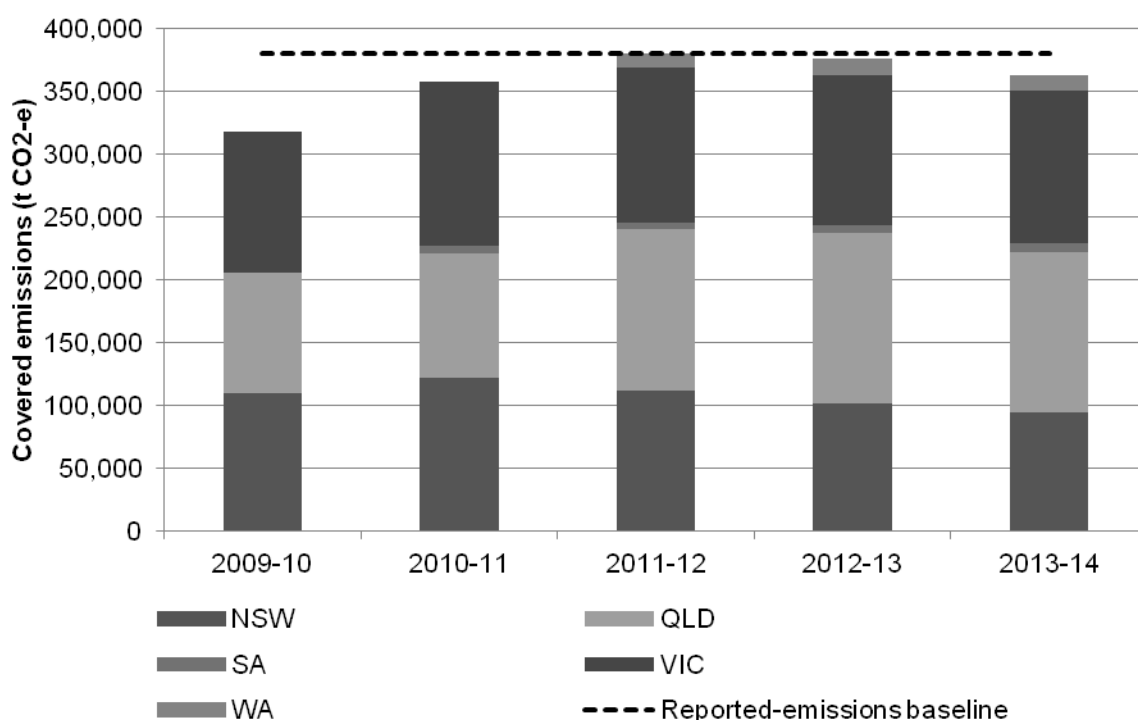
Table 6 provides the covered emissions for each of the state-based transport facilities.

Figure 10 and the final row in Table 6 shows Pear Co's aggregated covered emissions from 2009-10 to 2013-14, calculated by summing together the covered emissions for each state-based transport facility.

Table 6—Covered emissions for Pear Co's state-based transport facilities

Pear Co state transport facility	Covered emissions (t CO ₂ -e)				
	2009-10	2010-11	2011-12	2012-13	2013-14
NSW	110,120	122,000	112,034	102,012	95,023
QLD	95,650	99,650	128,956	135,931	127,605
SA	-	5,694	4,589	5,787	6,548
VIC	112,321	130,210	123,540	119,650	121,320
WA	-	-	11,063	13,450	12,301
Aggregated covered emissions (t CO ₂ -e)	318,091	357,554	380,182	376,830	362,797

Figure 10—Pear Co's aggregated covered emissions



Pear Co decides to make a nomination to report emissions as a national facility under regulation 2.19A of the NGER Regulations. Pear Co makes the nomination on 1 March 2016, which enables the national definition to take effect on 1 July 2016, which is when the safeguard mechanism commences. Pear Co must apply before the scheme commences, if it wants the national definition to apply from the start of the scheme (subregulation 2.19A(4) of the NGER Regulations).

The Regulator makes a reported-emissions baseline determination for Pear Co's national transport facility because it meets the criteria for interstate transport facilities (subsection 14(2)).

Prior to making the determination, the Regulator provides written notice to Pear Co (section 16(1)).

The baseline emissions number for the national facility definition is 380,182 t CO₂-e. This is the aggregated annual emissions in 2011-12, which is the highest aggregated emissions during the five financial years beginning on 1 July 2009 (subsection 14(2) and 17(1)) (see Figure 10).

This baseline emissions number will apply from 1 July 2016, which is the date that Pear Co nominated to have the national facility definition apply and is after the date of nomination (subsection 18(2)).

This reported-emissions baseline determination continues to apply until it is replaced by another baseline determination. It will reapply at the expiry of any subsequent determinations (section 18(3)).

Table 7—Key elements of baseline setting for a transport facility that elects to report on a national basis

Element	Treatment and reference
Criteria <i>Reported-emissions baseline determination</i>	Relate to the availability of historical data (subsection 14(1)) and having a national facility definition (subsection 14(2)).
Application deadline <i>National facility nomination</i>	<p>The Regulator makes the baseline determination, but not in response to an application, however before a determination is made, the responsible emitter must make a nomination to report emissions for a national facility.</p> <p>A nomination must be made before the year that the national definition will take effect and must take effect from 1 July of that financial year (regulation 2.19A of the NGER Regulations). The facility nomination must be made in the form approved by the Regulator.</p>
Application information	<p>Not applicable.</p> <p>This kind of baseline determination is made by the Regulator and not in response to an application.</p>
Audit requirement	Not applicable.
Baseline emissions number	Based on the highest annual emissions of aggregated covered emissions from state based transport facilities that make up the national definition, during the five financial years beginning on 1 July 2009 (section 17).
Commencement	Commences on the first 1 July after the nomination is made. For Pear Co this is 1 July 2016 (section 18).
Expiry	This determination applies until it is replaced by another determination. It also comes back into force at the expiry of any subsequent determinations (section 18).

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

National Greenhouse and Energy Reporting (Safeguard Mechanism) Rule 2015

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The safeguard mechanism, to commence in the *National Greenhouse and Energy Reporting Act 2007* (the Act) on 1 July 2016, is dependent upon a number of legislative rules to be made by the Minister for the Environment under section 22XS of the Act.

The *National Greenhouse and Energy Reporting (Safeguard Mechanism) Rule 2015* (the safeguard rule) outlines key elements of a responsible emitter's duty to avoid an excess emissions situation and provides detail on how a responsible emitter can meet that duty. The duty, established under the Act, requires responsible emitters to keep their net emissions number below their baseline emissions number. The primary role of the safeguard rule is the establishment of a baseline emissions number for a designated large facility and a range of information needs to be collected for the Regulator to determine the appropriate baseline emissions number for each facility.

Responsible emitters are persons with operational control of a designated large facility, typically corporations or their group members. Operational control is defined in sections 11, 11A and 11B of the Act. The basic rule for operational control is that it is held by the person that has the greatest ability to introduce and implement operational environmental and health and safety policies for a facility.

The safeguard rule establishes that a designated large facility is a facility which, in a single financial year, reports 100,000 tonnes or more of direct emissions under the Act. The Government expects this threshold to result in the coverage of around 140 large businesses.

Human rights implications

The human right engaged by the safeguard rule are the following privacy and reputation aspects (such as those protected by Article 17(1) of the International Covenant on Civil and Political Rights):

- Identifying facilities that are designated large facilities and quantifying the duty described above, depends on responsible emitters registering and submitting reports under the Act. The safeguard rule sets out the information to be included in a registration application under section 15B of the Act, which may include identifying information.
- Supporting transparency about the implementation of the safeguard rule, the safeguard rule requires the Clean Energy Regulator to publish information about designated large facilities. This information includes a responsible emitter's duty to avoid an excess emissions situation and situations where the duty has not been met.

There is no likely impact on the human right engaged, because the safeguard rule will apply to large facilities whose responsible emitters are only likely to be very large businesses, not individuals. Even in the very unlikely circumstance that an individual were to be a responsible emitter, information provided to the Clean Energy Regulator is protected by strict secrecy provisions in the *Clean Energy Regulator Act 2011* as well as the *Privacy Act 1988*. The information that is published about the safeguard mechanism is often publically available from other sources, not of a personal nature and relates to the integrity of the safeguard mechanism. Accordingly, the requirements are considered reasonable and unlikely to limit or adversely impact human rights. In particular, any potential impacts on privacy or reputation are not unlawful or arbitrary.

Conclusion

The Legislative Instrument is compatible with human rights because it is unlikely to limit human rights.

Greg Hunt

Minister for the Environment